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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 472

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, individually and on behalf of all members of the plaintiff Railway Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, a corporation, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and ROBERT M. HARKINSON and ARTHUR T. BESWICK, individually and on behalf of all members of the plaintiff Railway Labor Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

EDWARD J. FRUCHTMAN,
RICHARD F. WATT,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners—the United Railroad Operating Crafts, a Railway Labor Organization, and John J. Gallagher, Jr., Howard T. Hunt, Clifford W. Carlson, and Robert T. Owen, members of the petitioner organization, on behalf of themselves and all other members of the petitioner organization engaged in engine, train, yard, and hostling services employed by the respondent William Wyer, as trustee of the Long Island Rail Road Company; and also the United Railroad Operating Crafts, a Railway Labor Organization, and Robert Harkinson and Arthur T. Beswick, members of the petitioner organization, on behalf of themselves and all other members of the petitioner organization engaged in train and yard services employed by the respondent New York, New Haven and Hartford Railroad Company, said petitioners having been plaintiffs below in both of these causes—respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 23, 1953. The Court of Appeals affirmed *per curiam*, and without discussion, the judgments of the United States District Court for the Southern District of New York, dismissing the complaints on the ground that the court lacked jurisdiction over the subject matter.

By virtue of orders entered on September 19, 1953, and October 9, 1953, by Associate Justice Robert H. Jackson, the time for filing a petition for a writ of certiorari in these causes was extended to and including November 20, 1953.

OPINION BELOW.

The *per curiam* opinions of the Court of Appeals for the Second Circuit, dated June 23, 1953 (*Wyer* R. 68-70; *New Haven* R. 34-36), appear at 205 F. 2d 153. The opinions

of the district court have not yet been reported (*Wyer* R. 5-19; *New Haven* R. 4). The statement appearing at 205 F. 2d 153 that the opinion of the district court in the *Wyer* case is reported at 109 F. Supp. 916 is erroneous.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1) (62 Stat. 928).

QUESTIONS PRESENTED.

1. Does a district court of the United States have jurisdiction to interpret the Railway Labor Act, and particularly the Union Shop Amendment thereto (45 U. S. C. Sec. 152 Eleventh, Public Law 914, 81st Congress)?

2. Does a district court of the United States have jurisdiction, in a case brought before it under Section 1337 of Title 28 of the U. S. Code, to decide whether or not a given railway labor organization is "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act?

3. Is the issue of whether a given railway labor organization is "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act, so that membership in that organization would constitute compliance with a union shop agreement which embodies verbatim the "national in scope" language of the Amendment, a question of statutory interpretation for the courts or a dispute involving the interpretation or application of an agreement concerning "working conditions" as that phrase is used in Section 3 First (i) of the Railway Labor Act, over which disputes the National Railroad Adjustment Board has exclusive jurisdiction?

4. Is Section 3 First (f) of the Act, which provides ma-

chinery for determining whether an organization is qualified to participate in choosing labor members of the National Railroad Adjustment Board when that organization's claim to participate is disputed, applicable to the determination of whether a railway labor organization—which has made no claim to participate in the selection of Board members—is "national in scope" within the meaning of the Union Shop Amendment to the Railway Labor Act?

5. Has Congress, by enacting the Railway Labor Act, and in particular Section 3 thereof providing for the National Railroad Adjustment Board, deprived the federal courts of jurisdiction to decide any issues pertaining to union shop agreements entered into pursuant to the Union Shop Amendment to the Railway Labor Act, including the issue of whether or not a given railway labor organization is "national in scope"?

6. Has Congress, by enacting the Railway Labor Act, and in particular Section 3 First (f) thereof, deprived the federal courts of jurisdiction to decide any issues pertaining to union shop agreements entered into pursuant to the Union Shop Amendment to the Railway Labor Act, including the issue of whether or not a given railway labor organization is "national in scope" within the meaning of the Union Shop Amendment?

7. Does not an interpretation of the Railway Labor Act, and in particular of the Union Shop Amendment thereto, which requires employees, whose compliance with a union shop agreement is contested on the ground that the railway labor organization to which they belong is not "national in scope," to take their case to the National Railroad Adjustment Board deprive such employees of the due process of law guaranteed by the Fifth Amendment to the United States Constitution?

8. Does not an interpretation of the Railway Labor Act,

and in particular of the Union Shop Amendment thereto, requiring a railway labor organization, whose status as an organization "national in scope" is disputed and whose members are therefore claimed to be not in compliance with a union shop agreement, to seek to establish its status as "national in scope" through the procedures prescribed by Section 3 First (f) deprive such organization and its members of the due process of law guaranteed by the Fifth Amendment to the United States Constitution?

9. In the absence of any statutory definition of the phrase "national in scope" and of any standards or criteria for determining its meaning, does not an interpretation of the Railway Labor Act, and in particular of the Union Shop Amendment thereto and Section 3 First (f), requiring a railway labor organization and its members—where the organization is claimed to be not "national in scope" and whose members are therefore claimed to be not in compliance with a union shop agreement—to seek a remedy either before the National Railroad Adjustment Board or through the procedures prescribed by Section 3 First (f) before the Secretary of Labor and subsequently before a private three-man board, involve an unconstitutional delegation of legislative and judicial powers in violation of Section 1 of Article I and Section 1 of Article III of the United States Constitution?

10. Is not the National Railroad Adjustment Board, whose members are selected exclusively by railroads and by railway labor organizations and who are paid exclusively by the respective organizations they represent, essentially a private body or agency and as such constitutionally incapable of receiving a delegation of legislative or judicial power?

STATUTES INVOLVED.

Title 28, U. S. C., Section 1337:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Title 45, U. S. C., Sections 152 and 153 (the Railway Labor Act, Sections 2 and 3):

The Union Shop Amendment to the Railway Labor Act, Public Law 914, 81st Congress, appears as Section 152 Eleventh of the Act.

STATEMENT.

Prior to January of 1951 railroad employees were free, by virtue of the provisions of Sections 2 Fourth and Fifth of the Railway Labor Act as amended, to join or to refrain from joining any railway labor organization and to be free from discharge or other discipline or penalty for joining or refraining from joining any such organization. In short, union shop agreements were not legally permissible in the railroad field.

On January 10, 1951 that circumstance was changed by the Union Shop Amendment, Public Law 914, 81st Congress, now Section 2 Eleventh of the Act. That amendment authorized carriers and railway labor organizations to enter into union shop agreements requiring, as a condition of continued employment, that employees, within sixty days of first employment or the effective date of such an agreement, whichever is later, shall become members of the labor organization representing their craft or class. Section 2 Eleventh (c) provides, however, that in the case of employees engaged in the so-called operating crafts, namely, the engine, train, yard and hostling services, compliance with such an agreement could be had by joining "any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services. * * *"

These cases arise by reason of the fact that employees on the Long Island Rail Road and the New York, New Haven and Hartford Railroad were claimed not to have complied with union shop agreements entered into in accordance with the Union Shop Amendment to the Railway

Labor Act. Specifically, the claim was made that the employees had failed to comply inasmuch as the railway labor organization they joined, the United Railroad Operating Crafts, was not "national in scope". As a result of such claimed non-compliance, employees on these railroads were ordered discharged. At that point the threatened employees, and the United Railroad Operating Crafts, sought relief in the United States District Court for the Southern District of New York, claiming that the employees were in compliance since, despite the view taken by the railroads, the United Railroad Operating Crafts was "national in scope".

The Wyer (Long Island Rail Road Company) Case.

On June 20, 1952 the respondent William Wyer, as trustee of the Long Island Rail Road Company, entered into separate union shop agreements with the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Locomotive Engineers, and the Brotherhood of Railroad Trainmen, Exhibits A, B, and C to the amended complaint (*Wyer* R. 32-49). Each of these agreements required that employees in the classes or crafts involved must, as a condition of continued employment, become and remain members either of the particular organization holding the contract or "any one of the labor organizations * * * national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling service * * *" (*Wyer* R. 33, 39 and 45). As the quoted language of the agreements plainly reveals, the contracting parties were all but copying verbatim the portions of subsection (c) of the Union Shop Amendment to the Railway Labor Act which provide that an employee may comply by joining a "national in scope" railway labor organization other than the one holding the contract.

The individual petitioners, John J. Gallagher Jr., Howard T. Hunt, Clifford W. Carlson, and Robert T. Owens, were employees of the Long Island Rail Road, having worked for the railroad for long periods in various of the operating crafts (*Wyer* R. 23). In September and October of 1952 each of these employees was notified by the railroad that he had been cited for non-compliance with a union shop agreement by the particular Brotherhood to whose agreement he was subject (*Wyer* R. 23-26). Thereafter, the railroad held hearings with regard to the compliance of two of these employees, concluding that they were not in compliance, despite the fact that each of these men, as the railroad was informed and and knew, was a member of the United Railroad Operating Crafts (*Wyer* R. 24-25). In the cases of petitioners Carlson and Owens, the railroad held no hearings, even though each of them notified the railroad that he was in compliance by virtue of membership in the United Railroad Operating Crafts (*Wyer* R. 25-26). Plaintiffs Gallagher, Carlson, and Owens were discharged, and plaintiff Hunt threatened with discharge (*Wyer* R. 24-25).

At that point, petitioners Gallagher and Hunt, together with the United Railroad Operating Crafts, sought relief in the United States District Court for the Southern District of New York. Their complaint, filed on October 22, 1952, alleged that the suit was being brought on behalf of the named individuals and the organization and also on behalf of all other members of the United Railroad Operating Crafts in engine, train, yard, and hostling services employed by the Long Island Rail Road (*Wyer* R. 22-23). An amended complaint was filed on January 14, 1953 (*Wyer* R. 1).

The amended complaint stated that "the sole question involved in this litigation is whether or not the members

of plaintiff UROC, a railway labor organization national in scope, are, in view of the provisions of the National Railway Labor Act and particularly Title 45 U. S. C. Sec. 152-Eleventh, entitled to employment with the defendant and said carrier while maintaining their membership solely in said plaintiff labor organization UROC" (*Wyer* R. 27). The prayer for relief asked for temporary and permanent injunctions restraining the defendant trustee from discharging the individual plaintiffs and any other persons of the same class by reason of the fact that they were members only of the United Railroad Operating Crafts. It also requested that certain of the employees who had already been discharged be ordered restored to service (*Wyer* R. 29-31).

Temporary injunctions were entered on October 30, 1952 and January 7, 1953, enjoining the trustee from discharging any members of the class upon whose behalf the suit was brought and also requiring that certain of the employees who had been discharged be restored to service (*Wyer* R. 54-58).

The defendant Wyer, as trustee of the Long Island Rail Road, the defendants Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen, and the intervenor Brotherhood of Railroad Trainmen filed motions to dismiss on the ground, among others, that the court lacked jurisdiction of the subject matter, asserting that the Railway Labor Act vested exclusive jurisdiction in the National Railroad Adjustment Board and provided a procedure, in Section 3 First (f) of the Act, whereby an administrative board, set up after proceedings before the Secretary of Labor and the National Mediation Board, should determine whether or not a railway labor organization was national in scope (*Wyer* R. 50-53).

New York, New Haven and Hartford Railroad Case.

Apart from the parties involved and the dates, the facts and issues in this case are essentially the same as those in the *Wyer* case.

Decision of the District Court.

Arguments on the motions to dismiss in the two cases were heard by District Judge Edward A. Conger, who entered orders on April 27, 1953 granting the motions and dismissing the complaints on the ground that the court lacked jurisdiction over the subject matter (*Wyer* R. 3-5; *New Haven*, R. 2-4).

In a written opinion filed in the *Wyer* case on April 16, 1953 (*Wyer* R. 5-19) and relied upon as the basis for the decision in the *New Haven* case (*New Haven* R. 4), the court stated that it was satisfied "that the Adjustment Board has jurisdiction over the matters alleged in the amended complaint * * * [and] that since the Board has jurisdiction it is exclusive within the rule of the *Pitney, Slocum* and *Southern* cases, *supra*" (*Wyer* R. 18). The court had reference to *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1946); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950); and *Order of Railway Conductors* v. *Southern Ry. Co.*, 339 U. S. 255 (1950).

The district court also wrote (*Wyer* R. 14 and 16-17):

> I am convinced that the present controversy arises out of the interpretation or application of agreements concerning 'working conditions' as used in Section 3-First (i) of the Railway Labor Act.
>
> * * * * *
>
> UROC has no representatives on the Adjustment Board. The only way it can place its representatives on the Board is by seeking to participate under Section 3 (c) of the Act and in the event a dispute arises over its right to be represented, it may petition the

> Secretary of Labor who invokes the procedure specified in Section 3 (f). For my part, I think UROC should seek representation but for reasons best known to it, it evidently does not. However, the fact remains that the plaintiffs face a hard task if they are sent to the Adjustment Board for they will be confronted by the Brotherhoods who in effect have already determined their case by complaint to Wyer. In view of the fact that I believe the Adjustment Board has jurisdiction, which the Supreme Court has said is exclusive, I am not certain whether there is room for concern over how plaintiffs will fare before the Board.

Decision of the Court of Appeals.

On June 23, 1953, the Court of Appeals for the Second Circuit handed down the following *per curiam* opinion, 205 F. 2d 153:

> The orders are affirmed on the opinion of the District Court in *United Railroad Operating Crafts* v. *Wyer, Trustee.* * * *

On July 7, 1953 the petitioners in both cases moved in the Court of Appeals for the Second Circuit for a stay of the mandate in order to permit the filing in the United States Supreme Court of a petition for a writ of certiorari. The motions were opposed by the respondents, and on August 19, 1953 the Court of Appeals denied the motions. At that time petitioners, represented by other counsel, did not move in the Court of Appeals for a reconsideration of the denial, nor did they seek an order from this Court staying the mandate.

The mandate was returned to the United States District Court for the Southern District of New York, and judgments thereon were entered in the *Wyer* case on August 31, 1953 and in the *New Haven* case on September 3, 1953.

As the direct consequence of these developments a total of fourteen employees on the two railroads were discharged and released from service.

REASONS FOR GRANTING THE WRIT.

I.

THE QUESTION OF WHETHER THE FEDERAL COURTS HAVE JURISDICTION TO DETERMINE THE "NATIONAL IN SCOPE" CHARACTER OF A RAILWAY LABOR ORGANIZATION UNDER A UNION-SHOP AGREEMENT ENTERED INTO PURSUANT TO THE UNION SHOP AMENDMENT TO THE RAILWAY LABOR ACT IS ONE OF GREAT IMPORTANCE IN THE ADMINISTRATION OF THE ACT, WHICH IS NOW BEING RAISED FOR THE FIRST TIME IN MANY COURTS THROUGHOUT THE COUNTRY. IN VIEW OF THE LARGE NUMBER OF UNION SHOP AGREEMENTS ALREADY IN EFFECT, AND THE CERTAINTY THAT MANY ADDITIONAL AGREEMENTS WILL BE EXECUTED, IT IS ESSENTIAL THAT THE RESPECTIVE JURISDICTIONS OF THE COURTS AND THE NATIONAL RAILROAD ADJUSTMENT BOARD BE DETERMINED AS PROMPTLY AS POSSIBLE.

The basic questions raised by the complaints in the *Wyer* and *New Haven* cases may be stated as follows: Did the individual employees who joined the United Railroad Operating Crafts comply, by virtue of that membership, with the requirements of the union shop agreements applicable to them? That question is dependent upon another: Is the United Railroad Operating Crafts "national in scope" as that phrase, taken word for word from subsection (c) of the Union Shop Amendment to the Railway Labor Act, is employed in the union shop agreements?

The decision of the District Court, as affirmed by the Court of Appeals, holds that the meaning of the statutory language is for the National Railroad Adjustment Board to determine; that the jurisdiction of the Board over such a question is exclusive; and, therefore, that the federal courts cannot act.

The large number of union shop agreements now in

existence on many of the principal railroads of the country, applicable to and enforceable against literally tens of thousands of railroad employees in the operating crafts, makes the question of vital significance in the orderly administration of the Railway Labor Act. Without attempting to compile an exhaustive listing, petitioners believe that the scope of the problem is amply demonstrated by the existence of union shop agreements covering one or more of the operating crafts on the following railroads: Baltimore and Ohio Railroad; Northern Pacific Railway; Chicago, Burlington and Quincy Railroad; Pennsylvania Railroad; Long Island Rail Road; New York, New Haven and Hartford Railroad; Boston and Maine Railroad; Detroit, Toledo and Ironton Railroad; Chesapeake and Ohio Railway; Reading Railway; Michigan Central Railroad; Wabash Railroad; Missouri Pacific Railroad; Chicago, Milwaukee, St. Paul and Pacific Railroad; Chicago, Rock Island and Pacific Railroad; Chicago and North Western Railway; Union Pacific Railroad; Nickel Plate Road; Illinois Central Railroad; New York Central Railroad.

Most of the union shop agreements covering employees in the operating crafts on the railroads listed above are held by the three Brotherhoods involved in these two cases, namely, the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen. The Order of Railway Conductors and the Switchmen's Union of North America have entered into relatively few of these agreements.

The United Railroad Operating Crafts (UROC) was organized in January of 1951 in an effort to overcome the weaknesses of craft unionism by uniting into one union all railroad employees in the operating crafts, that is, in engine, train, yard, and hostling services. Since then it

has grown into an organization with approximately two hundred (200) locals with members in thirty-six (36) states employed on approximately sixty (60) railroads, including the twenty roads listed above. Its national headquarters were originally in San Francisco, California, the organization having been formed in California, but in September of 1953, after a referendum vote, its main offices were moved to Chicago, Illinois.

These cases, and others like them in different parts of the country, have arisen because at least three of the five so-called standard Brotherhoods, in enforcing their union shop agreements with railroads, have uniformly taken the position that membership in the United Railroad Operating Crafts does not constitute compliance. In other words, they contend that UROC is not "national in scope." The result is that the Brotherhoods, and particularly the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen, and the Brotherhood of Railroad Trainmen—the three organizations whose agreements are involved in the *Wyer* and *New Haven* cases—have cited hundreds of UROC members to the railroads as employees who have failed to comply with union shop agreements.

This situation has arisen on numerous railroads, in addition to the Long Island and New Haven roads. In fact, without endeavoring to specify all the instances, UROC men have been cited for non-compliance with union shop agreements on the Baltimore and Ohio Railroad; Northern Pacific Railway; Chicago, Burlington and Quincy Railroad; Pennsylvania Railroad; New York Central Railroad; Boston and Maine Railroad; Detroit, Toledo and Ironton Railroad; Chesapeake and Ohio Railway; Reading Railway; Michigan Central Railroad; Wabash Railroad; Nickel Plate Road; Illinois Central Railroad.

In order to protect their jobs and seniority rights, therefore, it became necessary for employees on the Baltimore and Ohio Railroad, the Northern Pacific Railroad, the Pennsylvania Railroad, the Boston and Maine Railroad, and the Detroit, Toledo and Ironton Railroad—as well as on the Long Island Rail Road and the New York, New Haven and Hartford Railroad—to seek relief in court. Developments on other roads may very well make it essential for other UROC members to do the same thing.

For the reasons presented below in Point II, resort to the National Railroad Adjustment Board, or to a System Board of Adjustment established under Section 3 Second of the Railway Labor Act as a substitute for the National Board, offers no real hope of any relief for employees who are members of UROC. Consequently, they have sought and will continue to seek remedy in the federal courts.

It is obvious, therefore, that the question of jurisdiction presented by these cases is one of real significance in the administration of the Railway Labor Act. For, as matters stand now, members of a bona fide railway labor organization seeking to exercise their rights under the Railway Labor Act are being discharged and threatened with discharge for failure to comply with union shop agreements, and the only basis for the claim of failure to comply is the contention that the organization to which they belong—United Railroad Operating Crafts—is not "national in scope". If the decision below is allowed to stand, hundreds and perhaps thousands of railroad employees on dozens of railroads will be discharged.

Moreover, the question is one of first impression upon which this Court has not spoken. As appears below in Point IV, the decisions of this Court do not decide it directly one way or the other; in fact they leave the matter so unclear and beclouded as to lead to almost uniform uncertainty and confusion in the lower courts.

It is for these reasons that this petition raises an important question which this Court should resolve now.

II.

TO INTERPRET THE RAILWAY LABOR ACT, AS IT HAS BEEN INTERPRETED BY THE COURTS BELOW, TO MEAN THAT CONGRESS HAS CONFERRED UPON THE NATIONAL RAILROAD ADJUSTMENT BOARD THE POWER TO INTERPRET THE STATUTORY LANGUAGE "NATIONAL IN SCOPE" INVOLVES AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AND JUDICIAL POWER TO THAT BOARD AND DEPRIVES PETITIONERS OF VALUABLE EMPLOYMENT AND SENIORITY RIGHTS WITHOUT DUE PROCESS OF LAW.

The decision of the District Court as affirmed by the Court of Appeals raises serious constitutional problems. It means that railroad employees in the position of the fourteen discharged men must seek their remedy before the National Railroad Adjustment Board—a board which makes no pretense of following procedures meeting the most elementary requirements of due process of law, which is presumptively biased against them, and which is essentially a private non-governmental body whose members are selected and paid by the Brotherhoods and the railroads. Moreover, that decision would permit the Adjustment Board to exercise legislative and judicial functions and to interpret the meaning of the Union Shop Amendment to the Railway Labor Act, and particularly the phrase "national in scope", in the absence of any legislative definition, standards, or criteria for determining such meaning. It is apparent therefore that the decision below violates basic constitutional principles, and particularly those embodied in Section 1 of Article I, Section 1 of Article III, and the due process clause of the Fifth Amendment.

A.

The Make-Up of the National Railroad Adjustment Board Is Such That It Cannot Constitutionally Receive a Congressional Delegation of Legislative or Judicial Power.

The discharged employees in these two cases belong to the so-called operating crafts and therefore would come before the First Division if they were to take their problems to the Adjustment Board. The First Division has ten members, five selected by the carriers and five selected by the national railway labor organizations. Each member is paid by the party he represents. 45 U. S. C. § 3 First (g) and (h). Each of the five so-called standard operating-craft Brotherhoods has a member on the Board.

It is plain, therefore, that the First Division of the Adjustment Board is a bipartisan group representing equally management and the five standard operating Brotherhoods, its members being paid by the interests they represent. Such a body is private and non-governmental in nature and consequently is incapable of receiving a delegation of legislative or judicial power. Cf. *Dahlberg* v. *Pittsburgh & L. E. R. Co.*, 138 F. 2d 121, 122-23 (C. A. 3d 1943); *Watson* v. *Missouri-K-T R. Co.*, 173 S. W. 2d 357 (Ct. Civ. App. Tex. 1943).

As this Court said in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936), the delegation of such powers to groups of employers and employees "is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested but to private persons whose interests may be and often are adverse to the interests of others in the same business * * *" Cf. *Schechter* v. *United States*, 295 U. S. 495, 537 (1935).

The perniciousness of such an attempted delegation is

high-lighted by the recent decision of the First Division of the Adjustment Board with regard to the union shop status of a member of UROC named Milton P. Hanson, an employee on the Chicago, Burlington and Quincy Railroad Company.

That decision also demonstrates the futility of allowing the federal courts to disclaim jurisdiction in favor of the Adjustment Board. For in the *Hanson* case it appears that the factor having great importance in the eyes of the members of the First Division was the failure of the United Railroad Operating Crafts to make a "showing that it has ever been adjudged to be 'national in scope' by any tribunal of competent jurisdiction." Obviously UROC could hardly make such a showing, for as the opinion admits, "there has been no final interpretation of the meaning of the words 'national in scope', as used in amendments to the Railway Labor Act, by any tribunal of competent jurisdiction." Indeed, if the decision below is allowed to stand, UROC will never be able to make such a showing because the gates to the courts are, by that decision, barred to it and its members.

Thus, the *Hanson* ruling, an omen of what would result were the fourteen discharged men on the New Haven and Long Island railroads to go before the Adjustment Board, as the courts below say they must, turns in large part on the fact that no "tribunal of competent jurisdiction" has either interpreted the words "national in scope" or held UROC to be "national in scope." Obviously, if the National Railroad Adjustment Board were the proper forum for determining these matters, as the courts below are convinced it is, it would not decide cases while impliedly confessing that "tribunals of competent jurisdiction" should decide them.

B.

The Procedures of the Adjustment Board Do Not Meet the Requirements of Due Process of Law.

In any event, the procedures of the Adjustment Board indicate, beyond all question, that it is not a body which constitutionally can exercise judicial or quasi-judicial powers. For, as the Board's rules indicate, the most elementary requirements of procedural due process of law are lacking. (See Circular No. 1 of the Adjustment Board and Circulars "A" and "B" of the First Division of the Board.) From these rules, it is evident that although "oral hearings" will be held if requested by either party, no provision is made for the attendance of witnesses or the presentation of evidence otherwise than through the informal so-called submissions, no official record is kept, and no standards are prescribed for weighing evidence and making findings of fact. Such procedures may suffice for the purpose of ironing out contract differences. They are completely inadequate, however, for judicial or quasi-judicial functions.

Combining such a proceeding with the complete absence of any provision in the Railroad Labor Act authorizing court review of an adverse Board decision, it is plain that there is no possible view upon which the Adjustment Board procedures can be held to satisfy the requirements of due process of law. Cf. *Washington Terminal Co.* v. *Boswell,* 124 F. 2d 235, 245-47 (App. D. C. 1941), aff'd by equally divided court, 319 U. S. 732 (1942).

III.

ALTHOUGH THERE IS AS YET NO DIRECT CONFLICT BETWEEN DIFFERENT COURTS OF APPEALS ON THE QUESTION OF JURISDICTION BEING RAISED NOW, THE DECISIONS OF THE COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS AND OF SEVERAL DISTRICT COURTS ARE INDICATIVE OF AN EXTRAORDINARY DEGREE OF CONFUSION, UNCERTAINTY, AND MISUNDERSTANDING AS TO THE MEANING OF THE RAILWAY LABOR ACT AND THE DECISIONS OF THIS COURT INTERPRETING IT. THE VARIOUS DISTRICT COURT AND COURT OF APPEALS' OPINIONS CANNOT BE RECONCILED, AND INASMUCH AS VALUABLE EMPLOYMENT AND SENIORITY RIGHTS OF RAILROAD EMPLOYEES ARE DEPENDENT UPON THE AVAILABILITY OF JUDICIAL RELIEF, IT IS ESSENTIAL THAT THIS COURT PROMPTLY ADVISE THE LOWER COURTS AS TO THE PRECISE EXTENT OF THEIR JURISDICTION.

The jurisdictional problem presented by these cases has been raised and passed upon by the Court of Appeals for the Ninth Circuit and by four District Courts, in addition of course, to the Court of Appeals and the District Court below. Although most of these decisions have ruled that the courts do not have jurisdiction, the variety of views expressed is remarkable. In fact, it may safely be said that many federal courts are thoroughly at sea when confronted with a jurisdictional problem in the Railway Labor Act field. The result is that courts, lawyers, and litigants do not and cannot know with any certainty the proper forum for adjudicating many pressing problems. To be sure, so far as jurisdictional disputes between unions and the interpretation of contracts are concerned, there is no doubt: the jurisdiction of the National Railroad Adjustment Board is exclusive, as is pointed out in Point IV below. But where the problem, as here, is different, confusion reigns. That is why, despite the absence of a direct conflict between Circuits, petitioners believe that this Court should now exer-

cise its authority to bring order out of the present jurisdictional chaos.

The following is a summary of the views and holdings of the courts, other than the District Court and the Court of Appeals below, that have passed upon the issue of jurisdiction in cases like these:

—One District Court has ruled that jurisdiction is in the courts and not in the Adjustment Board or the Secretary of Labor and the private three-man board under Section 3 First (f) of the Act. *United Railroad Operating Crafts, et al.* v. *Pennsylvania Railroad Company,* No. 52 C 1465, N. D. Ill., now on appeal in the Court of Appeals for the Seventh Circuit as No. 10914. No cross-appeal has been taken from the jurisdictional ruling.

—One District Court has ruled that jurisdiction is exclusively in the Adjustment Board. *Lake, et al.* v. *Baltimore and Ohio Railroad Company,* No. 3049, S. D. Ohio.

—One District Court retained jurisdiction pending exhaustion by the parties of their remedies before the Adjustment Board. *United Railroad Operating Crafts, et al.* v. *Northern Pacific Railroad Company,* W. D. Wash. This ruling was reversed by the Court of Appeals for the Ninth Circuit, No. 13439, which held that the Adjustment Board had exclusive jurisdiction and could properly interpret the statutory phrase "national in scope".

—One District Court has ruled that jurisdiction is not in the courts, and not in the Adjustment Board or a System Board because of their bias, and that only the Secretary of Labor and the three-man board under Section 3 First (f) of the Act can interpret and apply the statutory phrase "national in scope." *Piggott, et al.* v. *Detroit, Toledo & Ironton Railroad Company,* No. 12130, E. D. Mich.

Parenthetically, it is important to note that none of the five standard operating Brotherhoods has ever been found by the Secretary of Labor, pursuant to Section 3 First (f), to have a meritorious claim to participate in the selection of labor members of the Adjustment Board. Nor has any of them ever been found to be qualified to participate by a three-man board convened under Section 3 First (f). The fact is that each of these organizations participates and has participated in selecting labor members of the Board solely by the common consent of the remaining organizations. Thus, specifically, the Brotherhood of Locomotive Engineers participates only because each of the other four so-called standard operating Brotherhoods agrees that it shall participate. That is the way each of the Brotherhoods has achieved its "national in scope" status.

It should be added that in three other district court cases the jurisdictional issue has yet to be determined: *United Railroad Operating Crafts, et al.* v. *Boston and Maine Railroad, et al.*, No. 53-693-F, United States District Court for the District of Massachusetts; *Bohnen, et al.* v. *Baltimore and Ohio Chicago Terminal Railroad Company*, No. 53 C 1810, United States District Court for the Northern District of Illinois, Eastern Division; and *Johns* v. *Baltimore and Ohio Railroad Company*, 53 C 1927, United States District Court for the Northern District of Illinois, Eastern Division.

IV.

THE QUESTION OF JURISDICTION PRESENTED BY THIS PETITION HAS NOT BEEN DECIDED BY ANY OF THE PREVIOUS OPINIONS OF THIS COURT, ALTHOUGH THE LANGUAGE IN THE PITNEY, SLOCUM, AND SOUTHERN RAILWAY CASES HAS APPARENTLY CONFUSED THE LOWER COURTS INTO THINKING IT HAS BEEN SETTLED. IN ANY EVENT, THE PRINCIPLES EXPRESSED IN STEELE v. LOUISVILLE & NASHVILLE R. R. CO. REQUIRE THAT THE FEDERAL COURTS TAKE JURISDICTION.

The decisions relied upon by the District Court and the Court of Appeals are *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 (1950); *Slocum* v. *Delaware, L. & W. Ry. Co.*, 339 U. S. 239 (1950); and *Order of Railway Conductors* v. *Southern Ry. Co.*, 339 U. S. 255 (1950). According to Judge Conger, these hold that the jurisdiction of the National Railroad Adjustment Board is exclusive over the kind of problem involved here, which the court asserts is one arising "out of the interpretation or application of agreements concerning 'working conditions' as used in Section 3, First (i) of the Railway Labor Act" (*Wyer* R. 14, 18).

But the controversies presented to the courts in the *Pitney, Slocum,* and *Southern Railway* cases bear little or no resemblance to the problems now being raised. The *Pitney* and *Slocum* cases involved jurisdictional disputes between unions, and the *Southern Railway* case presented a question as to whether under an agreement certain employees were entitled to extra compensation.

These decisions are not applicable to the problems presented here for at least three reasons:

(1) The disputes now before the Court do not involve the interpretation or application of collective bargaining agreements. Rather, they involve the meaning of the statu-

tory phrase "national in scope"—a phrase which has been incorporated verbatim into the union shop agreements because the Union Shop Amendment to the Railway Labor Act specifically provides that an employee in an operating craft may comply by joining a "national in scope" union other than the one holding the contract. Thus such an employee has been granted a statutory right which every union shop agreement must recognize, either explicitly or implicitly. But copying statutory language into a contract, under circumstances where that language is controlling regardless of whether it is in the contract or not, cannot convert the problem from one involving construction of the statute into one involving merely the "interpretation or application" of an "agreement."

(2) Realistically viewed, the underlying dispute is not between the employees and the railroads, or even between the collective bargaining representatives and the railroads. Rather it is between the individual employees and the bargaining representatives—the Brotherhoods who cited the employees for non-compliance with the union shop agreements. For, by virtue of citing them, the Brotherhoods have taken the position that the employees are not members of any organization "national in scope"; in other words, the Brotherhoods are asserting that UROC is not "national in scope." The employees, obviously, contend that it is. Section 3 First (i), however, gives the Adjustment Board jurisdiction only over disputes between employees or their representatives on the one hand, and carriers on the other. Cf. this Court's comment in the *Slocum* case: "We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele* v. *Louisville & N. R. Co.* • • •" 339 U. S. 239, 244 n. 7 (1950).

(3) The National Railroad Adjustment Board, or a System Board operating in its stead, cannot provide an

impartial forum for administrative relief. Jurisdiction in such a board would necessarily mean that the individual employees must appear before a tribunal chosen in part by the very organizations against which they have their real complaint and which have already prejudged it.

The District Court was considerably troubled by this Court's opinion in *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192 (1944). Yet while recognizing that the petitioners would have a "hard task" if sent to the Adjustment Board, where they would "be confronted by the Brotherhoods who in effect have already determined their case," the District Court concluded that since the Adjustment Board had exclusive jurisdiction, "I am not certain whether there is room for concern over how plaintiffs will fare before the Board." And UROC could, if it wished, attempt to qualify as an organization entitled to participate in selecting labor members of the Board by invoking the procedures of Section 3 First (f) (*Wyer* R. 17).

By failing to follow the *Steele* case, it is submitted that the District Court and the Court of Appeals fell into serious error. For in these cases, as in the *Steele* case, the problems are properly for the courts and not for the Adjustment Board, because (1) the dispute is not one involving the interpretation of an agreement but rather one involving the interpretation of the statute and the enforcement of a statutory right; (2) the real controversy is between the employees and their representatives; and (3) neither the Adjustment Board nor a System Board can provide a fair or adequate administrative remedy. See 323 U. S. 192, 204-07 (1944).

CONCLUSION.

Petitioners believe that it cannot successfully be denied that the question presented by this petition is important. And they believe that it cannot confidently be asserted that the Railway Labor Act, and particularly the Union Shop Amendment to the Act, is so free from ambiguity as to make unlikely a variety of results in the lower courts.

But more, petitioners are firmly of the view that Congress could not have intended that valuable statutory rights—going to the very ability of a railroad employee to hold his job—should be turned over for recognition or denial to bodies wholly lacking in the attributes of governmental administrative agencies. If the courts cannot decide whether an organization is "national in scope" and in the process determine the meaning of that phrase, then only three alternative tribunals remain: the National Railroad Adjustment Board; a System Board of Adjustment functioning in lieu of the National Board; or a three-man board set up under Section 3 First (f) of the Act. Yet none of these three, properly speaking, is a judicial or quasi-judicial body, or even a governmental body of any kind, and none of them operates under procedures meeting the minimum requirements of due process of law. Yet each of them purports, under statutory authority, to make final and binding determinations from which there is no judicial review.

Petitioners believe that under the Constitution decisions affecting the very existence of a trade union and the jobs of its members cannot be left to bodies in part composed of their rivals—essentially private groups whose procedures are a far cry from due process of law. In the absence of statutory definition, criteria, or standards, surely the courts cannot abdicate their traditional powers to substitute tribunals as unqualified as these.

Consequently petitioners earnestly urge this Court to grant their petition.

Respectfully submitted,

EDWARD J. FRUCHTMAN,
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FILED
DEC 24 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. 472

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, individually and on behalf of all members of the plaintiff Railway Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

—against—

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, a corporation, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and ROBERT M. HARKINSON and ARTHUR T. BESWICK, individually and on behalf of all members of the plaintiff Railway Labor Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM FOR RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION.

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Hartford Railroad Company,
Room 3841, Grand Central Terminal,
New York, N. Y.

THE COURT PRESS, 130 Cedar Street, N. Y. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1953.

No. .

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, individually and on behalf of all members of the plaintiff Railway Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

—against—

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, a corporation, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and ROBERT M. HARKINSON and ARTHUR T. BESWICK, individually and on behalf of all members of the plaintiff Railway Labor Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM FOR RESPONDENT, THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, IN OPPOSITION.

The petition for certiorari recites (p. 11) that apart from the parties involved and the dates, the facts

and issues in The New York, New Haven and Hartford Railroad Company case are essentially the same as those in the Long Island Rail Road Company case. In the interest of brevity, therefore, this respondent relies upon the brief of the respondents Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Engineers in the Long Island Rail Road case, and adopts the same reasons for denial of the writ.

Respectfully submitted,

EDWARD R. BRUMLEY,
Counsel for Respondent,
The New York, New Haven
and Hartford Railroad Company.

New York, N. Y., December 23, 1953.

FILED
DEC 28 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, individually and on behalf of all members of the plaintiff Railway Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, a corporation, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and ROBERT M. HARKINSON and ARTHUR T. BESWICK, individually and on behalf of all members of the plaintiff Railway Labor Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

BRIEF OF THE RESPONDENT WILLIAM WYER, AS TRUSTEE OF THE LONG ISLAND RAIL ROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES

Railway Labor Act (45 U. S. C. A., Secs. 151, *et seq.*):

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No.

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, individually and on behalf of all members of the plaintiff Railway Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, a corporation, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, A Railroad Labor Organization National in Scope, and ROBERT M. HARKINSON and ARTHUR T. BESWICK, individually and on behalf of all members of the plaintiff Railway Labor Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

BRIEF OF THE RESPONDENT WILLIAM WYER, AS TRUSTEE OF THE LONG ISLAND RAIL ROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

Proceedings and Opinions Below

On April 27, 1953, an order was duly made and entered in the United States District Court for the Southern Dis-

trict of New York by District Judge Edward A. Conger, dismissing the amended complaint of the petitioners herein on the ground that the Court lacked jurisdiction over the subject matter of the action (R. 3-5).* On June 23, 1953, said order was unanimously affirmed by the Court of Appeals for the Second Circuit on the basis of the opinion of the District Court (R. 71).

The opinion of the District Court (R. 5-19) is reported at 115 F. Supp. 359.

The *Per Curiam* opinion of the Court of Appeals (R. 68-69) is reported at 205 F. 2d 153.

II.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1), 62 Stat. 928.

III.

The Questions Presented

Although it is alleged in the petition (pp. 4-5) that various constitutional questions are raised herein, it is clear from the record that such questions were not presented or decided below. In this connection it will be observed that the amended complaint itself alleges in Paragraph 14 thereof that "the sole question involved in this litigation" is whether or not the members of the petitioner UROC are entitled to employment with The Long Island Rail Road, under the provisions of Section 2-Eleventh of the

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* This brief is being filed only in the action involving the respondent Wyer, as Trustee of The Long Island Rail Road Company. All references to the Record therefore refer to the Transcipt of Record in said action.

Railway Labor Act (Title 45, U. S. C. A., Sec. 152-Eleventh), "while maintaining their membership solely in said Plaintiff labor organization UROC" (R. 27).

In dismissing the amended complaint, the District Court merely held

> (1) that the disputes alleged therein arose out of "the interpretation or application of agreements (referring to the union security agreements between The Long Island Rail Road and the respondent Brotherhoods annexed to the amended complaint as Exhibits A, B and C) concerning 'working conditions' as used in Section 3-First (i) of the Railway Labor Act" (R. 14), and
>
> (2) that since said Section of the Railway Labor Act confers jurisdiction on the appropriate division of the National Railroad Adjustment Board to hear and determine all disputes of this character, the jurisdiction of the National Railroad Adjustment Board is "exclusive" under the holding of this Court in *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795; and *Order of Railway Conductors of America* v. *Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811 (R. 18).

Inasmuch as these were the only issues decided by the District Court and the Court of Appeals, it is respectfully submitted that they are the only questions properly before this Court on the present petition for a writ of certiorari to review the determination below.*

---

* After procuring an extension of time to file the present petition for a writ of certiorari on other grounds, the petitioners moved in the District Court pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, to vacate the judgment and order entered on the mandate of the Court of Appeals and for leave to amend their amended complaint so as to raise for the first time various alleged constitutional questions. Said motion, however, was denied by the District Court in an opinion dated December 8, 1953, which is set forth in Appendix A, *infra*, pp. 12-14. An order was duly entered on said decision on December 15, 1953.

IV.

The Statute

The sections of the Railway Labor Act involved in this case are Section 2-Sixth (45 U. S. C. A., Sec. 152-Sixth) and Section 3-First (45 U. S. C. A., Sec. 153-First).

The pertinent portions of each of these sections are set forth in Appendix B, *infra,* pp. 15-18.

V.

The Basic Facts

The petitioner, United Railroad Operating Crafts (hereinafter referred to as UROC) alleges that it is "a labor organization, national in scope, organized in accordance with the provisions of the Railway Labor Act, as amended (45 U. S. C., Sec. 151, *et seq.*), admitting to membership railroad employees in engine, train, yard and hostling services and crafts, with its national headquarters in the City of San Francisco, State of California" (R. 20).

Prior to June 20, 1952, The Long Island Rail Road Company entered into separate collective bargaining agreements with the three Brotherhoods named as respondents herein, relating to and controlling the hours of labor, wages and working conditions of its various classes of employees, including the individual petitioners (R. 21-22).

On June 20, 1952, each of said collective bargaining agreements was modified by a supplemental union security (or so-called "Union Shop") agreement, duly executed in conformity with the requirements of Section 2-Eleventh of the Railway Labor Act, as amended in 1951 (45 U. S. C. A., Sec. 152-Eleventh) so as to authorize agreements of this character (R. 22). Said supplemental union security agreements, which became effective July 1, 1952, are annexed to the amended complaint as Exhibits A, B and C (R. 32-49).

All three of the aforesaid supplemental union security agreements are identical in their terms and contain the provisions usually found in such agreements. Furthermore, and as the District Court took great pains to point out in its opinion, "there is not one line in the amended complaint suggesting" that the same are "invalid" in any respect whatsoever (R. 15).

Although each agreement provides in Paragraph 1 thereof that within sixty days from the date thereof all employees in the classes of crafts represented by the Brotherhood executing the same "shall become and remain members" of such Brotherhood (R. 32, 38, 44), it is thereafter expressly provided in Paragraph 2 of the agreement that this requirement "shall be satisfied if any employe shall hold or acquire membership in any one of the labor organizations", other than such Brotherhood, "national in scope, organized in accordance with the Railway Labor Act and admitting to membership employes of a craft or class in engine, train, yard or hostling service, that is in any of the services or capacities covered in Section 3, First, (h), of the Railway Labor Act". Paragraph 2 of the agreement further provides that "nothing contained in this Agreement shall prevent any employe from changing membership from one organization to another organization admitting to membership employes of a craft or class in any of the services above specified" (R. 33, 39, 45).

The only other portion of the agreement that is material is Paragraph 5. After providing that the General Chairman of the Brotherhood shall notify the Manager of Personnel of the carrier "in writing, of the identity of any employe whose employment he requests be terminated by reason of failure to comply with the terms of this Agreement", this paragraph then prescribes in some detail the procedure to be followed in notifying the employee thus charged with failure to comply with the terms of the union security agreement of his default and in conducting the

hearing to which such employee is entitled in the event that he disputes the fact that he has failed to comply with the terms of the union security agreement (R. 34-36, 40-42, 46-48).

The amended complaint alleges that the respective General Chairman of the respondent Brotherhoods (in the case of the petitioner Gallagher, the Brotherhood of Locomotive Firemen and Enginemen; in the case of the petitioner Hunt, the Brotherhood of Locomotive Engineers; and in the case of the petitioners Carlson and Owens, the Brotherhood of Railroad Trainmen) notified the Manager of Personnel of The Long Island Railroad Company that the individual petitioners had failed to comply with the terms of the aforesaid union security agreements and requested that their employments be terminated on this ground, and that due notice of said request was thereafter transmitted to each of said petitioners pursuant to the terms of Paragraph 5 of the particular agreement involved (R. 23, 24, 25).

In the cases of Gallagher and Hunt hearings were subsequently conducted by the Manager of Personnel of the carrier as required by the union security agreement (R. 23, 24). In the case of Gallagher, a decision was rendered on or about October 16, 1952, terminating his employment "for non-compliance with the provisions of the said Union Shop Agreement between Defendant and said Fireman Brotherhood" (R. 24). Although the hearing was completed in the case of Hunt, a temporary restraining order thereafter issued by the District Court prevented the rendition of a decision in the case of this petitioner (R. 25).

As respects the petitioners Carlson and Owens, the factual situation is somewhat different, at least if we are to accept the allegation of the amended complaint as true, as we must for the purposes of the present proceeding. The amended complaint alleges that following the receipt of

their respective notifications that they were charged with being in "non-compliance with said Union Shop Agreement" with the Brotherhood of Railroad Trainmen, these petitioners separately notified the carrier that "they were in compliance with said Agreement by reason of membership in Plaintiff UROC and requested hearings". The amended complaint then goes on to allege that "Notwithstanding such notifications by said Plaintiffs to Defendant, and said proofs of compliance with the Agreement, as aforesaid", no hearings were held and that "said Plaintiffs Carlson and Owens were nevertheless released and discharged from Defendant's service and employment on December 12, 1952, by separate notifications in writing stating that they were so released because they failed to avail themselves of the opportunity of being heard in connection with the matter of their compliance with said Agreement" (R. 25-26).

Ignoring completely the administrative remedy which the Railway Labor Act affords each of these four individual petitioners for the redress of their grievances, the amended complaint gratuitously concludes by alleging (R. 28):

> "15. That in the event the course of conduct of the Defendant (*i. e.*, The Long Island Rail Road Company) in discharging the members of the Plaintiff labor organization from Defendant's employ by reason of membership only in UROC continues, the effect will be to destroy the Plaintiff labor organization, contrary to the fundamental rights guaranteed by the Constitution of the United States, by the Railway Labor Act, and by the Labor, Management Relations Act, and to cause not only the Plaintiff labor organization, but the individual Plaintiffs, and all others for whom and on behalf of whom this action is brought, irreparable damage for which there is no adequate remedy at law."

VI.

Reasons for Denying the Writ

In the Courts below the petitioners did not question the jurisdiction of the National Railroad Adjustment Board under Section 3-First (i)-(p) of the Railway Labor Act (45 U. S. C. A., Sec. 153-First (i)-(p)) to hear and determine all disputes growing out of "the interpretation or application of agreements" concerning "working conditions", nor did they dispute the proposition that the jurisdiction thus conferred on the National Railroad Adjustment Board by Congress is exclusive under the holding of this Court in *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795; and *Order of Railway Conductors of America* v. *Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811.

On the contrary, they impliedly conceded these things but took the position that the disputes alleged in the amended complaint did not grow out of "the interpretation or application of agreements" concerning "working conditions". In support of this contention they argued that continued union membership under a union security agreement, executed in accordance with the requirements of Section 2-Eleventh of the Railway Labor Act, is merely " 'a condition of continued employment' which they say is distinguishable from 'working conditions', in that the former prescribes a condition precedent to employment while the latter concerns conditions affecting the performance of the work of employees" (R. 11).

In rejecting this arbitrary and unrealistic distinction, the District Court relied on *Missouri Pacific R. Co.* v. *Norwood*, 42 F. 2d 765, 773 (W. D. Ark. 1930), cert. denied 283 U. S. 249 and *In re Chicago North Shore & M. R. Co.*, 147 F. 2d 723, 727 (C. A. 7, 1945), cert. denied 325 U. S. 852, in which the phrase "working conditions" as used in the

Railway Labor Act was defined as any "such conditions affecting the work of the employees as might be the subject of agreement between the carriers and the employees."

Having thus found that the disputes alleged in the amended complaint arose out of "the interpretation or application of agreements" concerning "working conditions" within the meaning of Section 3-First (i)-(p) of the Railway Labor Act (R. 14), it is respectfully submitted that the District Court had no alternative than to hold that jurisdiction to hear and determine the same was vested exclusively in the National Railroad Adjustment Board (R. 18).

On the record presently before this Court there is clearly no basis for the claim advanced by the petitioners under Point I of their brief (pp. 13-17) that the National Railroad Adjustment Board should be deprived of its statutory jurisdiction to hear and determine such disputes merely because, in the process of doing so, it may be required to determine whether the petitioner UROC is a labor organization "national in scope" within the meaning of the union security agreements involved herein and Section 2-Eleventh of the Railway Act (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263).

In *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 64 S. Ct. 851, 88 L. Ed. 1170, the National Labor Relations Board was required to construe the term "employee", as used in the National Labor Relations Act, in order to determine a dispute before it. In that case this Court declined to place a "completely definitive limitation" on the term "employee" as thus used in the Act because, as it stated at page 130 of its opinion, "that task has been assigned primarily to the agency created by Congress to administer the Act" and "resolving that question, like determining whether unfair labor prac-

tices have been committed, 'belongs to the usual administrative routine' of the Board", subject, however, to the limited judicial review thereafter allowed in such cases.

In similarly holding that it was the function of the National Bituminous Coal Commission to construe the terms "bituminous coal" and "producer", as used in the Bituminous Coal Conservation Act, this Court stated at page 400 of its opinion in *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263, "The fact that such determination involved an interpretation of the term 'bituminous coal' is of no more significance here than was the fact that in the *Shields* case a decision by the Interstate Commerce Commission of what constituted an 'interurban' electric railway was necessary for the ultimate findings as to the applicability of the Railway Labor Act to carriers."

The respondent Wyer, and the carrier whom he represents as Trustee, do not, of course, claim that the phrase "national in scope", as applied to a labor organization in the union security agreements annexed to the amended complaint herein and as used in Section 2-Eleventh of the Railway Labor Act, requires any construction other than that which is apparently placed thereon by the Railway Labor Act itself, to wit, a labor organization which is either actually represented on the National Railroad Adjustment Board or is certified for representation thereon pursuant to the provisions of Paragraphs (c) and (f) of Section 3-First of the Act.

The case at bar is readily distinguishable from *Steele* v. *Louisville & Nashville R. Co.,* 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, on which the petitioners rely to support their claim that the Federal Courts should take jurisdiction of the disputes involved herein (Pet. Br., Pt. IV, pp. 24-26). While it is true that in the *Steele* case there was a conflict in interest between the plaintiff and the bargaining agent of his craft, the issue there presented and decided

by this Court went much deeper than this. In the *Steele* case the collective bargaining agreement before the Court was plainly illegal because it discriminated against Negro firemen employed by the carrier as a class, solely on the ground of race. For this reason the Court found that it was not only flagrantly violative of the Railway Labor Act but that it also deprived a very substantial minority of the carrier's employees of basic statutory and constitutional rights and was, therefore, wholly ineffective to confer any jurisdiction on the National Railroad Adjustment Board. No such claim is made in the amended complaint herein. As the District Court took pains to point out in its opinion, "there is not one line in the amended complaint suggesting that the collective bargaining agreements here are invalid" (R. 15).

Conclusion

In the absence of a showing that constitutional questions were raised and decided below which should be passed on, by this Court, it is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Dated: New York, New York,
December 23, 1953.

Respectfully submitted,

WILLIAM J. O'BRIEN,
Counsel for Respondent William Wyer, as Trustee of The Long Island Rail Road Company,
Pennsylvania Station,
New York 1, New York.

WILLIAM F. MCNULTY,
Of Counsel.

Appendix A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 79-223

UNITED RAILROAD OPERATING CRAFTS, *et al.*,
Plaintiffs-Appellants,

against

THE NEW YORK NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Defendant-Appellee,

BROTHERHOOD OF RAILROAD TRAINMEN,
Intervenor-Appellee,

and

Civ. 79-308

UNITED RAILROAD OPERATING CRAFTS, *et al.*,
Plaintiffs-Appellants,

against

WILLIAM WYER, *et al.*,
Defendants-Appellees,

BROTHERHOOD OF RAILROAD TRAINMEN,
Intervenor-Appellee.

Memorandum

Conger, J.:

Applications by the plaintiffs under Rule 60(b)(6), F. R. C. P., to vacate and set aside the orders and final judgment of August 31, 1953 entered on the mandate of the

Court of Appeals for the Second Circuit, and modifying the order of April 27, 1953 dismissing the amended complaints so as to permit plaintiffs to file an amendment to their amended complaints.

Rule 60(b)(6) authorizes relief from a judgment for "any other reason justifying relief from the operation of the judgment". Plaintiffs place no reliance upon subdivisions (1) to (5) of Rule 60(b).

Plaintiffs' reason for relief under Rule 60(b)(6) amounts to this: that the conclusions expressed in the opinion of the Court dated April 16, 1953 (115 F. Supp. 359), as effectuated by the order of April 27, 1953 and judgment of August 31, 1953 entered on the mandate of the Court of Appeals, raise serious questions of the constitutionality of the union shop amendments to the Railway Labor Act, so that plaintiffs in view of the irreparable harm ensuing, should now be permitted to challenge these amendments in these suits. Aside from the fact that the plaintiffs have waited six months from the entry of the order dismissing the suits and four months after the affirmance by the Court of Appeals and also aside from the fact that UROC has opportunity to raise the problem in other cases pending (I am not certain, however, how this would benefit the individual plaintiffs here), the relief sought is denied because the plaintiffs could have, and should have, posed the question long prior to the order of April 27, 1953.

My opinion of April 16, 1953 with the subsequent and consequent orders entered thereon did not bring into being the constitutional issue urged here. Such issue was present and alive when plaintiffs filed their original complaints. Further the authorities cited by the defendants in their attack on the amended complaint, and adopted by the Court suggested the strong possibility that the Court's

decision might be in accord with these authorities. The plaintiffs may not have anticipated such result but they chose their theory of attack and now they may not adopt a new one, which certainly was within their knowledge but which they chose not to assert.

The applications are denied. *Ackerman* v. *United States*, 340 U. S. 193; *Von Wedel* v. *McGrath*, 100 F. Supp. 434; aff'd *per curiam* 194 F. (2d) 1013; see also *Klapprott* v. *United States*, 335 U. S. 601; *United States* v. *Karahalias*, 205 F. (2d) 331.

Settle Orders.

/s/ Edward A. Conger,
United States District Judge.

Dated: December 8, 1953.

Appendix B

Pertinent Provisions of Railway Labor Act

Section 2-Sixth of the Act (45 U. S. C. A., Sec. 152-Sixth), provides:

> "Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing contained in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties."

The above section is supplemented by Section 3-First of the Act (45 U. S. C. A., Sec. 153-First) under which the National Railroad Adjustment Board is created.

Paragraphs (a) through (h) of Section 3-First deal with the organization and functioning of the National Railroad Adjustment Board, which consists of "thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations, national in scope, as have been or may be organized in accordance with section 152 of this title." Paragraph (h) provides that the

Board shall be composed of four independent divisions, each having an equal number of carrier and labor members and each having jurisdiction over disputes involving employees of specified services and crafts. The First Division, which is composed of ten members, is the division which is given jurisdiction over disputes in the operating services, *i. e.*, involving engineers, firemen, hostlers, conductors, trainmen and yard-service employees.

Paragraph (f) outlines the procedure to be followed in the event that a dispute arises as to the right of any "national labor organization" to participate in the selection of the labor members of the Board. This paragraph provides:

> "(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation oBard shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accord-

ance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding."

Paragraphs (i) through (p) of Section 3-First specifically deal with the procedure for settling "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions".

This portion of the statute, in so far as it is pertinent to the jurisdictional issue presently before this Court, reads as follows:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings

to the employee or employees and the carrier or carriers involved in any disputes submitted to them."

* * * * *

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award * * *."

* * * * *

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States * * * a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, * * *. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

DEC 29 19
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, JOHN J. GALLAGHER, HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, Petitioners,

v.

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN.

UNITED RAILROAD OPERATING CRAFTS, ROBERT M. HARKINSON and ARTHUR T. BESWICK, Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, JOHN J. GALLAGHER, HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, Petitioners,

v.

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN.

UNITED RAILROAD OPERATING CRAFTS, ROBERT M. HARKINSON and ARTHUR T. BESWICK, Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION

Opinions Below

The opinion of the District Court (R. 5-19)[1] is reported at 115 F. Supp. 359. The opinion of the Court of Appeals

[1] The petition herein seeks review not only in the suit against Wyer but also a similar suit by UROC and two individual employees against the New York, New Haven and Hartford Railroad Company. The Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen were parties only to the suit against Wyer. Accordingly this brief in opposition deals only with the Wyer case and all record references are to the Wyer record. However, the issues in the two cases are identical and all arguments herein made apply equally as much to the New York, New Haven and Hartford Railroad Company case.

for the Second Circuit (R. 68-70) is reported at 205 F. 2d 153.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1), 62 Stat. 928.

Question Presented

The only question presented by the petition[2] is whether the courts have jurisdiction of a suit against a carrier brought for reinstatement, back pay or injunctive relief by employees discharged or threatened with discharge for non-compliance with a union shop agreement entered into in conformity with Section 2, Eleventh of the Railway Labor Act, where the employees claim that the discharges and threatened discharges are improper either because the carrier failed to accord the hearings provided in the agreement or because, in administering the agreement, the carrier determined that the labor organization to which the employees belonged was not national in scope within the meaning of the provisions in the agreement and in the Railway Labor Act which would have protected employees from discharge if they were members of a labor organization national in scope.

Statutes Involved

The pertinent provisions of Sections 2 and 3 of the Railway Labor Act (45 U. S. C., §§152, 153), are printed in Appendix A, *infra*, p. 19.

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[2] The petition states at pages 4-5 that four constitutional questions (Nos. 7-10) are presented. However, as pointed out *infra*, pages 7-8, these questions were not raised in the courts below and are not before this Court.

Statement

The United Railroad Operating Crafts, hereinafter called UROC, and four individuals, Gallagher, Hunt, Carlson and Owens, brought suit in the United States District Court against Wyer as trustee of the Long Island Rail Road Company (the carrier), to secure the reinstatement with back pay of Gallagher, Carlson and Owens and to enjoin the threatened discharge of Hunt (R. 29-30).

The amended complaint alleged that on June 20, 1952, the carrier entered into three separate union shop agreements, one with the Brotherhood of Locomotive Engineers (the Engineers), one with the Brotherhood of Locomotive Firemen and Enginemen (the Firemen), and one with the Brotherhood of Railroad Trainmen (the Trainmen), (R. 21-22, 32-43, 44-49). These agreements followed the language of the 1951 union shop amendment added by Section 2, Eleventh, of the Railway Labor Act (45 U. S. C. 1952 Supp. 152, Eleventh). They required employees in the operating crafts of engineer, firemen and trainmen to join the contracting union[3] within 60 days after the effective date of the agreement and thereafter to maintain such membership as a condition of employment, but further provided in Section 2(a) thereof, as required by Paragraph Eleventh (c) of Section 2 of the Railway Labor Act, that compliance could be effected by joining and maintaining membership in any other labor organization "national in scope" rather than the contracting union (R. 20-21, 32-49).[4]

---

[3] Plaintiffs Hunt and Gallagher are covered by the Engineers' and the Firemen's contracts, respectively, and plaintiffs Carlson and Owens by the Trainmen's contract.

[4] Paragraphs Fourth and Fifth of Section 2 forbade discharges for anti-union or pro-union reasons. See *General Committee, B. L. E.* v. *M.-K.-T. R. Co.*, 320 U. S. 323, 331. See also 40 Op. A. G. 254

The amended complaint alleged that the four individual plaintiffs were at all material times members of UROC, that UROC was a labor organization national in scope within the meaning of the union shop agreements and within the meaning of Section 2, Eleventh (c) of the Railway Labor Act, but that nevertheless the carrier had discharged the plaintiffs Gallagher, Carlson and Owens, and threatened to discharge the plaintiff Hunt solely because of non-membership in the Brotherhoods, the carrier having determined that UROC was not national in scope and that hence membership therein did not constitute compliance with the union shop agreements (R. 23-26). With respect to plaintiffs Carlson and Owens it was also alleged that, although they requested hearings in accordance with the provisions of the union shop agreement, the carrier proceeded forthwith to discharge them for alleged failure to request a hearing (R. 25-26).[5]

The amended complaint alleged that the action was brought for the violation of plaintiffs' rights under the provisions of the Railway Labor Act and the legally binding provisions of collective bargaining agreements made

(1942). Paragraph Eleventh, added by the 1951 amendment—allowing discharges under union shop agreements conforming to its requirements—by its terms (see subdivision (d)), expressly amends the prohibitions of Paragraphs Fourth and Fifth. Except for the special proviso of subdivision (c) of Paragraph Eleventh—allowing *operating* employees the alternative of membership in a national in scope union instead of the contracting union—the 1951 amendment was modelled after the union shop amendments to the National Labor Relations Act which were included in the National Labor Management Relations Act of 1947 (29 U. S. C., 1952 Supp. 158(3)). See S. Rep. No. 2262, 81st Cong., 2d Sess. 3; H. Rep. No. 2811, 81st Cong., 2d Sess. 2. For the reason Congress made special provision for operating, as distinguished from non-operating employees, see note 22, *infra*, p. 16.

[5] That is, with respect to Carlson and Owens, there is a dispute as to whether they did or did not request a hearing by the carrier.

pursuant to the Railway Labor Act between the carrier and the Engineers, Firemen and Trainmen in their capacities as collective bargaining agents for the crafts in which the individual plaintiffs were employed (R. 19-20).

The Engineers and the Firemen moved to dismiss the amended complaint for lack of jurisdiction of the subject matter on two grounds (R. 50-51):[6] First, that Congress, by the Railway Labor Act (45 U. S. C. 153 [First(i)-(o)]), deprived the courts of jurisdiction to decide any issues pertaining to grievances of employees against carriers or pertaining to the interpretation and application of the union shop agreements alleged in the amended complaint, by making such issues cognizable solely (a) initially, by the procedures lawfully provided in said agreements, and (b) then, by the National Railroad Adjustment Board. Second, that Congress, by the Railway Labor Act, deprived the courts of jurisdiction to determine whether any railway labor organization is national in scope, by making such issue cognizable solely by a board to be set up by the National Mediation Board after appropriate proceedings before the Secretary of Labor, as provided in Section 3 First(f) of said Act (45 U. S. C. 153 First(f)).

Upon the authority of *Order of Railway Conductors* v. *Pitney*, 326 U. S. 255; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors* v. *Southern Railway Company*, 339 U. S. 255, the District Court held that the National Railroad Adjustment Board had exclusive jurisdiction over the subject matter of the amended complaint. The District Court did not reach the other ground of the motion to dismiss for lack of jurisdiction (R. 5-19).

---

[6] Similar motions were made by the carrier and the Trainmen (R. 53).

The Court of Appeals affirmed, *per curiam,* upon the opinion of the District Court (R. 68-70).

Having, on other grounds,[7] secured extension of time for the filing of the petition for certiorari in the instant case from September 21, 1953 to November 20, 1953, petitioners, by motion dated October 27, 1953, moved in the District Court under Rule 60(b)(6) of the Federal Rules of Civil Procedure for the vacation of the judgment and order of the District Court, entered upon the mandate of the Court of Appeals, dismissing the amended complaint for lack of jurisdiction, and for leave to add to the amended complaint an entirely new count so as to allege that the Railway Labor Act was unconstitutional in various respects. So far as here relevant, the new count would have asserted, *inter alia,* that the administrative procedures provided in Section 3 of the Railway Labor Act are unconstitutional and, hence, the District Court had jurisdiction to determine whether petitioner UROC is a railway labor organization "national in scope" under Paragraph Eleventh of Section 2 of the Act and whether, therefore, the discharge of UROC members should be restrained as violative of Paragraphs Fourth and Fifth of Section 2 of the Act.[8]

The District Court, on December 8, 1953, denied petitioners' motion on the ground that they could have, but chose not to, raise the constitutional issues when the case was originally before that Court. Under these circumstances, the District Court held, denial of the motion was

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[7] See note 11, *infra,* p. 8.

[8] See note 4, *supra,* p. 3.

required by *Ackermann* v. *United States*, 340 U. S. 193.[9] The decision of the District Court is set forth in Appendix B, *infra*, page 3. An order of dismissal of the motion was entered on December 15, 1953.

Argument

1. Questions Nos. 7-10, set forth at pages 4-5 of the petition—questioning the constitutionality of the administrative procedures provided in Section 3 of the Railway Labor Act—are not before this Court. The petitioners chose, in their amended complaint, not to challenge the constitutionality of those administrative procedures[10] which, if available, oust the District Court of jurisdiction over the subject matter of the action. In the first of the actions instituted by the petitioners, *United Railroad Operating Crafts, et al.* v. *Northern Pacific Railway*, No. 2976, W. D. Wash., S. D. (cited at p. 22 of petition), the original complaint included a separate count challenging the constitutionality of the Railway Labor Act, but, on January 30, 1952, prior to the hearing on the motion for a preliminary injunction, UROC

[9] The petitioners also could have sought leave to add the additional count, raising the constitutional issues, by a motion under Rule 15(a) made after the decision of the District Court on April 16, 1953 and prior to the entry of the order of dismissal on April 27, 1953; and they could have sought such leave under Rule 59 during the ten-day period following the entry of the order of dismissal. See *Markert* v. *Swift*, 173 F. 2d 517 (C. A. 2). The District Court noted that petitioners waited until six months after the dismissal of the amended complaint, and four months after the affirmance by the Court of Appeals.

[10] Paragraph 14 of the amended complaint alleged that "*the sole question involved*" is whether membership in UROC satisfies the union shop amendment to the Railway Labor Act (R. 27; see Pet. 9-10).

withdrew that count.[11] The instant case and the companion *New Haven* case were the next to be instituted. Then followed the other actions cited at pages 22-23 of the petition. The complaints in all of the cases begun subsequent to the *Northern Pacific* action were based only on matters of statutory interpretation.

Manifestly, constitutional questions may not now be imported into the record by the petition. In seeking so to do, petitioners, in effect, ask this Court to treat the petition, to that extent, as an application for relief which Rule 60(b)(6) of the Federal Rules of Civil Procedure commands shall be made to the District Court. Such application has been made to, and denied by, the District Court. If petitioners deem such denial error, their remedy is to appeal to the Court of Appeals for the Second Circuit and, in the event of affirmance there, then petition to this Court for certiorari. Prosecution of those further steps would not, of course, be affected by the denial of the instant petition. Moreover, even if petitioners had been able, upon the amended complaint before the District Court to question the constitutionality of the administrative procedures of the Railway Labor Act, having failed to do so, this Court will not now rule upon the issue of constitutionality. *Duignan* v. *United States,* 274 U. S. 195, 200.

2. The instant petition, therefore, can only ask this Court to pass upon the question of Congressional intention to make exclusive the administrative procedures provided in Section 3 of the Railway Labor Act. Yet, at the same

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[11] Extensions of time for the filing of the petition for certiorari in the instant case were obtained on the ground of the pendency of appeal in the *Northern Pacific Railway* case to the Court of Appeals for the Ninth Circuit. The latter court, on November 6, 1953, reversed the District Court and directed that the complaint be dismissed. The decision of the Court of Appeals is unofficially reported at 33 LRRM 2146.

time, in other litigation, petitioner UROC seeks a declaration that any such Congressional purpose is, in any event, constitutionally incapable of being effectuated.

Following the argument of the motion to vacate the judgment and order of dismissal in the instant case, UROC moved in *Johns* v. *Baltimore and Ohio Railroad Company*, No. 53 C 1927, N. D. Ill., E. D. (cited at p. 23 of the petition) for leave to amend the complaint. At that time, defendant had not yet answered nor moved with respect to the complaint. On December 2, 1953 District Judge La Buy signed an order granting leave to file *instanter* an amendment asserting the aforementioned grounds of unconstitutionality of the Railway Labor Act and requesting the convening of a three-judge court, under 28 U. S. C. Section 2284. Pursuant to the provisions of Judge La Buy's order, the Chief Judge of the Court of Appeals for the Seventh Circuit has designated Circuit Judge Lindley and District Judge Hoffman to sit with Judge La Buy, and the motion for a preliminary injunction has been set for hearing on January 5, 1954.

There are two further cases pending in which the jurisdictional issue has not yet been ruled on.[12] *United Railroad*

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[12] UROC has withdrawn the appeal to the Court of Appeals for the Sixth Circuit from the order of dismissal in *Lake, et al.* v. *Baltimore and Ohio Railroad Company*, No. 3409, S. D. Ohio, W. D. (cited at p. 22 of the petition). The decision of the District Court is unofficially reported at 31 LRRM 2565.

In *United Operating Crafts, et al.* v. *Pennsylvania Railroad Company*, No. 52 C 1465, N. D. Ill., E. D. (also cited at p. 22 of the petition), the Special Master ruled that the court had jurisdiction to determine whether UROC was "national in scope". The judgment and order of the District Court confirming the Master's report and dismissing the complaint upon the merits has been appealed by UROC on the ground that UROC should have been found to be a railway labor organization "national in scope". While no cross-appeal has been taken from the jurisdictional ruling, that issue may, on the appeal, nevertheless be raised by the appellee, or, *sua sponte*, by the Court of Appeals. *United States* v. *Corrick*, 298 U. S. 435, 440.

Operating Crafts, et al. v. *Boston & Maine Railroad, et al.*, No. 53-693-F, D. C. Mass.; *Bohnen et al.* v. *Baltimore & Ohio Chicago Terminal Railroad Company*, No. 53 C 1810, N. D. Ill., E. D. (cited at p. 23 of the petition). In both of these cases, UROC may, and no doubt will, seek leave to amend the complaints so as to assert the aforesaid constitutional issues. Presumably, if UROC hereafter institutes suits against the other railroads cited at page 15 of the petition, the complaints will, from the outset, raise the constitutional issues.

This Court should not exercise its discretionary power to grant certiorari in favor of petitioners who chose not to raise the constitutional issues in the instant case. Whatever the importance of the questions of statutory construction—and assuming they have not been settled by prior decisions of this Court (see *infra*, pp. 10-16)—if there is any substantial issue either of constitutionality or statutory construction, appropriate occasion for the grant of certiorari will be presented by one or another of the cases in which this Court may have before it the questions both of constitutionality and of statutory interpretation. *Cf. Sterling* v. *Constantin*, 287 U. S. 378, 393-394; *Public Service Commission* v. *Brashear Lines*, 312 U. S. 621, 625.

3. The statutory construction by the courts below is so manifestly correct and in accord with applicable decisions of this Court as to warrant denial of the writ.

The Union shop agreements under which the carrier acted in the instant case conform strictly to the provisions of Section 2 Eleventh of the Railway Labor Act. Hence, this suit does not involve the validity of the agreements. The litigation is over the correctness of two determinations

made by the carrier, in administering a union shop agreement, *i. e.*, (1) that UROC is not national in scope and (2) that, in any event, two of the individual petitioners (Carlson and Owens), did not request the hearing afforded by the agreement. The instant case is, therefore, analogous to, and governed by prior decisions in which this Court has held that an employee seeking to restrain or set aside the carrier's action under a contract must invoke the jurisdiction of the National Railroad Adjustment Board. See *Order of Railway Conductors* v. *Pitney*, 326 U. S. 255; *Slocum* v. *Delaware & W. R. Co.*, 339 U. S. 239, 244; *Order of Railway Conductors* v. *Southern Railway Company*, 339 U. S. 255. See also *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653, 660-661.[13]

This does not mean that, in a proceeding before it, the Adjustment Board is to determine whether UROC is national in scope. For Congress has provided in Section 3,

[13] Whatever may have been the case prior to *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, the First Division of the National Railroad Adjustment Board—which has jurisdiction over disputes involving operating employees (see Section 3, First(h))—has, ever since 1948, accepted petitions filed by labor organizations which did not participate in the selection of the labor members of the board, and has, since 1950, accepted petitions of individual employees. See Fourteenth Annual Report of National Mediation Board (1948), p. 73; Fifteenth Annual Report (1949), p. 71; Sixteenth Annual Report (1950), p. 93; Seventeenth Annual Report (1951), p. 85; Eighteenth Annual Report (1952), p. 73. An appendix to the brief of the Engineers and the Firemen in the Court of Appeals in the instant case sets forth a summary made from the records of the First Division which shows that between December 4, 1947 and April 18, 1953, 58 cases were docketed in which the petitions were filed by individual employees without sponsorship by a labor organization or filed by labor organizations which neither hold membership in, nor participate in, the selection of labor members of the First Division. The summary showed that, as of the time of its preparation, awards had been made in 20 of those cases. Subsequently, 5 more awards have been made in those cases and 22 new cases in those categories have been docketed.

First(f) of the Railway Labor Act, a special agency to determine that issue, *i. e.*, a three man board constituted by the National Mediation Board.[14] The procedure provided in Section 3, First(f) parallels Section 2, Ninth of the Railway Labor Act directing the National Mediation Board to determine the bargaining representative of employees in case of dispute. This Court recognized in *Switchmen's Union* v. *Mediation Board,* 320 U. S. 297, that certification of the employees' representative in case of dispute is essential in collective bargaining. For it authoritatively informs the carrier of the identity of the union with whom the carrier is obligated to bargain.[15] Similarly, it is essential to the effective operation of the proviso of subdivision (c) of the union shop amendment to the Railway Labor Act—giving operating employees the option of membership in the contracting union or in a union national in scope[16]—that there shall be no uncertainty as to the national in scope status of a railway labor organization.

Otherwise, every operating employee would have to act at his peril in relying upon membership in a non-contracting union since he could not know whether membership in such union would satisfy the requirements of the union shop

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[14] Under Section 3, First(f) a railway labor organization may present to the Secretary of Labor its claim to be "national in scope". The Secretary is directed to investigate the claim, and, if he finds it "has merit" to notify the National Mediation Board which, in turn, is directed to constitute a special board. One member of the special board is designated by the claimant, one by the railway labor organizations already having national in scope status and a third, neutral member, by the National Mediation Board.

[15] *Switchmen's Union* v. *Mediation Board, supra,* holds that the procedure under Section 2, Ninth is exclusive and that employees may not secure judicial review thereof.

[16] The reason for providing operating employees with this alternative is set forth in note 22, *infra,* p. 16.

agreement.[17] Likewise, every carrier would be placed in a dilemma when requested by the contracting union to discharge an employee who claimed to be in compliance with the union shop agreement by reason of membership in a non-contracting union.[18] Manifestly, therefore, the special three man board constituted under Section 3, First (f) must be the exclusive agency for resolving a dispute as to whether a union is national in scope.[18a] For only such an agency is capable of effectively dealing with this issue if the objectives of the Railway Labor Act are to be achieved.

Jurisdiction in the Adjustment Board to determine whether a claimant union is national in scope would, of

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[17] This does not mean that operating employees may not join UROC until it becomes national in scope. On the contrary, by reason of subdivision (a) of Section 2, Eleventh: An employee may, with impunity, become a member of another labor organization as well as a member of the contracting union. And, where UROC is the contracting union, membership therein alone satisfies the statute as to employees for whom it is the collective bargaining representative, irrespective of UROC's lack of national in scope status.

[18] The following would be the inevitable consequence if the three man board constituted under Section 3, First(f) were not the exclusive agency for determining (and making a "final and binding" finding as to) whether a union is national in scope:

> The employee would risk discharge if the carrier differed with him as to the national in scope character of the non-contracting union which he chose to join, or if the carrier's decision in his favor were subsequently held to have been erroneous. The carrier discharging a member of such non-contracting union would face the prospect of a proceeding for reinstatement and back pay. On the other hand, should the carrier refuse to discharge such employee, it might well, particularly if there were many of its employees in that category, find itself confronted with not only proceedings instituted before the National Railroad Adjustment Board by the contracting union to secure compliance with the union shop agreement, but also individual claims by members of the contracting union for loss of pay advantages they would have obtained—by reason of the usual seniority provisions of the applicable general collective bargaining agreement—had the non-members been discharged under the union shop agreement.

[18a] The distribution of functions between the National Railroad Adjustment Board and the special board constituted by the Mediation Board

course, have the advantage over determinations by various district courts and courts of appeal, in that it would make for uniformity of decision. *Cf. Garner* v. *Teamsters, Chauffeurs and Helpers Local Union*, 347 U. S. ....., December 14, 1953. However, jurisdiction in the Section 3, First(f) three man board has two further and crucial advantages, even over proceedings before the Adjustment Board. First, it assures an absolute uniformity of decision which can not be obtained under the case by case proceedings before the Adjustment Board.[19] Second, it provides an advance determination of the issue of national in scope, while the jurisdiction of the Adjustment Board can be in-

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under Section 3, First(f) has illuminating parallels in other provisions of the Railway Labor Act. Thus, Section 1, First (45 U. S. C. 151, First) provides that the Interstate Commerce Commission shall, upon request of the National Mediation Board, determine whether any line operated by electric power is a "carrier" or is an "interurban or suburban electric railway." See *Shields* v. *Utah, Idaho R. Co.*, 305 U. S. 177, 180-181; *Hudson & M. R. Co.*, 216 I. C. C. 745, upheld in *Hudson & M. R. Co.* v. *Hardy*, 106 F. 2d 327 (C. A. 2), cert. denied, 307 U. S. 640. Section 1, Fifth makes a similar provision for determination by the I. C. C. as to whether a person who performs a particular class of work is an "employee or subordinate official" of a carrier for the purpose of proceedings before the National Mediation Board. See *Ore Dock Foremen and Laborers*, 246 I. C. C. 703; *Hudson & M. R. Co.*, 249 I. C. C. 415; *Union Pacific R. Co.*, 259 I. C. C. 443; *Roadmasters (St. Louis S. F. R. Co.)*, 263 I. C. C. 607; *Union Pacific R. Co.*, 264 I. C. C. 239. Compare *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 399-400.

[19]A finding by the Adjustment Board in a particular case that UROC was not national in scope would provide no guide for employees or carriers. The finding of the Adjustment Board would, necessarily, relate to the status of UROC at a time when the particular dispute arose. As to subsequent disputes, the Adjustment Board would have to make an entirely new determination. For UROC might claim, for example, that, in the interim, it had been certified as the collective bargaining agent for a significant number of employees in the railroad industry.

voked only after the carrier has effected a discharge or has refused to comply with the request made by the contracting union.[20]

If such a special board, constituted under Section 3, First (f), found UROC national in scope, there could be no dispute over whether membership in UROC satisfied the requirements of a union shop agreement. Then the National Railroad Adjustment Board would be called upon to decide only such questions—not peculiar to membership in UROC—as whether an employee had made a timely tender of his dues, etc.[21] As noted by Judge Conger (R. 7), an issue of that type exists as to the petitioners Carlson and Owens in the instant case. A like issue was involved in *Lake* v. *Baltimore & Ohio Railroad Co.*, 31 LRRM 2565 (S. D. Oh., W. D.), where there was a dispute as to whether Lake, a UROC member, had been improperly denied a hearing. Those are the same questions as will routinely be decided by the Adjustment Board under union shop agreements covering non-operating employees who, under the Railway Labor

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[20] Section 3, First(i) provides that disputes may be referred to the Adjustment Board by the parties or either of the parties *after* adjustment at the carrier level has failed. Paragraph Second of Section 2 requires the parties to seek a settlement of the dispute at the carrier level. Paragraph Sixth of Section 2 requires that the carrier afford a hearing to the employee. The union shop agreements in the instant case provide for such hearing (R. 34-36, 40-42, 46-48).

[21] *Cf. Pressed Steel Car Co., Inc.*, 89 N. L. R. B. 276, where the Labor Board upheld a discharge in the case of an employee who failed to follow the procedure prescribed by the union for obtaining exoneration of dues for a period of layoffs. See also *Union Starch & Refining Co.* v. *N. L. R. B.*, 186 F. 2d 1008 (C. A. 7), enforcing the Labor Board's findings that tender of dues satisfied a union shop agreement even though the employee refused to accept membership in the union.

Act, may be required to maintain membership in the contracting union.[22]

4. There is no conflict between the circuits and no confusion in the decisions dismissing the UROC suits for lack of jurisdiction.

The only other court of appeals to pass on the precise issue here involved, adopted exactly the same interpretation of the statute as the court below. *UROC* v. *Northern Pacific R. R. Co.*, 33 LRRM 2146 (9th Cir., November 6, 1953). Three district courts, in addition to the court below, have likewise interpreted the statute as providing exclusive administrative remedies and excluding courts from jurisdiction in cases brought by UROC or its members seeking reinstatement, back pay or injunctive relief. *Pigott* v. *Detroit, Toledo & Ironton Railroad Co.*, 33 LRRM 2093 (E. D. Mich., S. D.); *Lake* v. *Baltimore and Ohio Railroad*

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[22] Non-operating employees, of course, constitute the vast majority of railroad workers. The proviso clause of subdivision (c) of Section 2, Eleventh affords the alternative of membership in a national in scope union only as to operating employees. The legislative history of the union shop amendment makes clear that Congress allowed such alternative membership at the instance of the Brotherhoods who wished to accomplish two purposes. First, to conform to their historical practice under which employees who repeatedly shifted back and forth in their jobs (*i. e.*, from firemen to engineers and from brakemen to conductors) customarily chose and retained membership in whichever one of the Brotherhoods they preferred, whether or not it was the contracting union. Second, to avoid evasion of the objective of the union shop amendment—to compel employees to bear the cost of collective bargaining—by requiring them to maintain membership either in the contracting union or in one which participated in collective bargaining at a national level with carriers as a whole. See S. Rep. No. 2262, 81st Cong., 2d Sess., 3; H. Rep. No. 2811, 81st Cong., 2d Sess., 2, 13; Hearings before a Subcommittee of the Committee on Labor & Public Welfare, on S. 3295, 81st Cong., 2d Sess., 15-16, 18-19, 66-68, 78-79; Hearings before the Committee on Interstate & Foreign Commerce, on H. R. 7789, 81st Cong., 2d Sess. 13, 29-31, 192-193; 96 Cong. Rec. 15735, 16261, 16268, 17052, 17055, 17058, 17059.

Co., 31 LRRM 2656 (S. D. Oh., W. D.); *UROC* v. *Northern Pacific R. R. Co.*, No. 2976 (W. D. Wash., S. D.).[23]

There is no merit to petitioners' assertion that railway employees are left uncertain as to their administrative remedy because of a "chaos" of views expressed by the courts which dismissed for lack of jurisdiction suits by UROC or its members (Pet. 21-22). Those decisions are entirely consistent. In all of them the courts held that Congress had directed that the National Railroad Adjustment Board shall be the exclusive forum for an employee seeking to restrain or to set aside a discharge under a union shop agreement. In *Pigott* v. *Detroit, Toledo & Ironton Railroad Co.*, 33 LRRM 2093, E. D. Mich., S. D. (cited at p. 22 of petition), Judge Levin, in addition to holding that the Adjustment Board was the forum for employees seeking reinstatement with back pay for alleged wrongful discharge under a union shop agreement, went further, and held that the special three man board constituted under Section 3, First(f) of the Railway Labor Act, rather than the Adjustment Board, is the agency to determine the issue of the national in scope status of a union. Thus, Judge Levin adopted both of the contentions advanced by the respondents in the instant case, whereas none of the other courts, in dismissing for lack of jurisdiction, regarded it as necessary to rule upon the second contention.[24]

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[23] The only district court which reached a different result on the question of jurisdiction, dismissed on the merits, *UROC* v. *Pennsylvania Railroad Co.*, No. 52 C 1465, N. D. Ill., E. D. See note 12, *supra*, p. 9.

[24] As pointed out above, *supra*, pp. 5-6, the second contention was urged by the respondents in the courts below in the instant case but was not dealt with by the district court or the court of appeals. It was likewise urged before, but not passed upon by the other courts which dismissed for lack of jurisdiction the suits brought by UROC or its members.

5. The contention made at pages 24-26 of the petition that the decisions of the courts below are in conflict with *Steele* v. *Louisville & N. R. Co.*, 323 U. S. 192, is entirely without substance. It is based upon petitioners' erroneous assumption that the courts below interpreted the Railway Labor Act as committing to the Adjustment Board the determination of whether UROC is national in scope. As pointed out *supra*, p. 12, the determination of the national in scope issue is for a three-man board constituted by the Mediation Board under Section 3 First (f) of the Act. Since the deciding vote on the special board is that of the public member appointed by the National Mediation Board (see note 14, *supra*, p. 12), all petitioners' arguments with respect to the unfairness of delegating the interpretation and application of the statutory phrase "national in scope" to an agency which is allegedly biased, prejudiced and composed of private rather than public members, are inapplicable.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be denied.

December 23, 1953.

Respectfully submitted,

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APPENDIX A

Railway Labor Act of 1934, as Amended 48 Stat. 1186 (1934), 45 U.S.C. §152 (1946), as amended 64 Stat. 1238 (1951) 45 U.S.C. §152 (1952 Supp.); 48 Stat. 1187 (1934), 45 U.S.C. §153 (1946)

§152. General Duties.

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of

the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden.

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements.

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * *

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the ef-

fective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered

in the First division of subsection (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§153. National Railroad Adjustment Board.
First. Establishment; composition; powers and duties; divisions; hearings and awards.

There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers desgnated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor

organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house

employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the contro-

versy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suits the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid

out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

• • •

APPENDIX B

Memorandum Opinion of Conger, J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 79-223

UNITED RAILROAD OPERATING CRAFTS, ET AL.,
Plaintiffs-Appellants,

against

THE NEW YORK NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Defendant-Appellee,

BROTHERHOOD OF RAILROAD TRAINMEN,
Intervenor-Appellee,

and

Civ. 79-308

UNITED RAILROAD OPERATING CRAFTS, ET AL.,
Plaintiffs-Appellants,

against

WILLIAM WYER, ET AL.,
Defendants-Appellees,

BROTHERHOOD OF RAILROAD TRAINMEN,
Intervenor-Appellee.

CONGER, J.:

MEMORANDUM

Applications by the plaintiffs under Rule 60(b)(6), F.R.C.P., to vacate and set aside the orders and final judg-

ment of August 31, 1953 entered on the mandate of the Court of Appeals for the Second Circuit, and modifying the order of April 27, 1953 dismissing the amended complaints so as to permit plaintiffs to file an amendment to their amended complaints.

Rule 60(b)(6) authorizes relief from a judgment for "any other reason justifying relief from the operation of the judgment." Plaintiffs place no reliance upon subdivisions (1) to (5) of Rule 60(b).

Plaintiffs' reason for relief under Rule 60(b)(6) amounts to this: that the conclusions expressed in the opinion of the court dated April 16, 1953 (115 F. Supp. 359), as effectuated by the order of April 27, 1953 and judgment of August 31, 1953 entered on the mandate of the Court of Appeals, raise serious questions of the constitutionality of the union shop amendments to the Railway Labor Act, so that plaintiffs in view of the irreparable harm ensuing, should now be permitted to challenge these amendments in these suits. Aside from the fact that the plaintiffs have waited six months from the entry of the order dismissing the suits and four months after the affirmance by the Court of Appeals and also aside from the fact that UROC has opportunity to raise the problem in other cases pending (I am not certain, however, how this would benefit the individual plaintiffs here), the relief sought is denied because the plaintiffs could have, and should have, posed the question long prior to the order of April 27, 1953.

My opinion of April 16, 1953 with the subsequent and consequent orders entered thereon did not bring into being the constitutional issue urged here. Such issue was present and alive when plaintiffs filed their original complaints. Further the authorities cited by the defendants in their attack on the amended complaint, and adopted by the court suggested the strong possibility that the court's decision might be in accord with these authorities. The plaintiffs

may not have anticipated such result but they chose their theory of attack and now they may not adopt a new one, which certainly was within their knowledge but which they chose not to assert.

The applications are denied. *Ackerman* v. *United States,* 340 U. S. 193; *Von Wedel* v. *McGrath,* 100 F. Supp. 434; aff'd *per curiam* 194 F. (2d) 1013; See also *Klapprott* v. *United States,* 335 U. S. 601; *United States* v. *Karahalias,* 205 F. (2d) 331.

Settle Orders.

/s/ Edward A. Conger
United States District Judge

Dated: December 8, 1953

DEC 30 1953
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

October Term, 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, a Railroad Labor Organization National in Scope, and JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, individually and on behalf of all members of the plaintiff Railway Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, a corporation, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, a Railroad Labor Organization National in Scope, and ROBERT M. HARKINSON and ARTHUR T. BESWICK, individually and on behalf of all members of the plaintiff Railway Labor Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

BRIEF ON BEHALF OF RESPONDENT BROTHERHOOD OF RAILROAD TRAINMEN

BERNARD L. ALDERMAN,
Counsel for Respondent
Brotherhood of Railroad Trainmen.

807 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-3432-3.

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IN THE

Supreme Court of the United States

October Term, 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, a Railroad Labor Organization National in Scope, and JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, individually and on behalf of all members of the plaintiff Railway Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, a corporation, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, a Railroad Labor Organization National in Scope, and ROBERT M. HARKINSON and ARTHUR T. BESWICK, individually and on behalf of all members of the plaintiff Railway Labor Organization as a class who are too numerous to be made parties plaintiffs,

Petitioners,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

BRIEF ON BEHALF OF RESPONDENT BROTHERHOOD OF RAILROAD TRAINMEN

The petitioners seek the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 23, 1953 (R.

68-70),* which affirmed the judgment of the United States District Court for the Southern District of New York dismissing the amended complaint on the ground that the District Court lacked jurisdiction over the subject matter of the amended complaint and, further, that the National Railroad Adjustment Board had exclusive jurisdiction over such subject matter (R. 5-19).

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (R. 68-70) is reported at 205 F. 2d 153. The opinion of the District Court for the Southern District of New York (R. 5-19) is reported at 115 F. Supp. 359.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1) (62 Stat. 928).

Question Presented

The sole question presented by the petition is whether Section 3 of the Railway Labor Act which established the National Railroad Adjustment Board granted to that Board

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* All references, unless otherwise noted, refer to the Transcript of Record in the action involving the respondent Wyer, as Trustee of The Long Island Rail Road Company. The respondent Brotherhood of Railroad Trainmen appears in both actions and will clearly designate references involving the respondent The New York, New Haven and Hartford Railroad Company, where such references are necessary, by specifically referring to the New Haven Transcript of Record.

exclusive jurisdiction to settle disputes between a carrier and its employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions and, more specifically, to exercise such jurisdiction to determine a dispute arising under Section 2-Eleventh of the Railway Labor Act affecting union shop agreements.

Statutes Involved

The pertinent provisions of Sections 2 and 3 of the Railway Labor Act (45 U. S. C. A., Sections 152, 153) are printed herein in Appendix A, *infra*, pp. 17-28.

Statement

United Railroad Operating Crafts (hereinafter referred to as UROC) was organized in the State of California in the year 1951. The three respondent national in scope railroad labor organizations were all organized in the 19th century. They are the Brotherhood of Railroad Trainmen (hereinafter referred to as the Trainmen), the Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as the Firemen) and the Brotherhood of Locomotive Engineers (hereinafter referred to as the Engineers). Each of the three respondent Brotherhoods has represented its craft through separate collective bargaining agreements for many years in dealing with the respondent The Long Island Rail Road Company. Subsequent to the enactment of the union shop amendment and on June 20, 1952, the three Brotherhoods supplemented their original agreements

and entered into union shop agreements with the respondent The Long Island Rail Road Company. The three agreements are identical and each one became effective July 1, 1952 (R. 32-49). Each agreement is in accordance with the provisions of Section 2-Eleventh of the Railway Labor Act, as amended in 1951 to authorize union shop agreements, providing in substance that as a condition of continued employment, employees covered by the original basic labor agreement between the Brotherhood and the carrier shall, within 60 days after the effective date of the union shop agreement, become and remain members of the contracting union or if they shall, within the same 60 days, acquire membership in any railway labor organization other than the contracting union "national in scope, organized in accordance with the Railway Labor Act" (R. 33, 39, 45). The 60-day period allowed by the union shop agreements within which time an employee could affiliate himself with one of the national in scope Railroad Brotherhoods ended on August 29, 1952.

On or about September 17, 1952, the respondent The Long Island Rail Road Company notified the individual plaintiff Gallagher that he had been cited by the Brotherhood of Locomotive Firemen and Enginemen for not being in compliance with the Firemen's union shop agreement. The carrier afforded Gallagher a hearing. Gallagher duly demanded a hearing (amended complaint, par. 7B, R. 23) and such hearing was held on October 3, 1952. At the hearing Gallagher asserted that he was in compliance with the union shop agreement in that he had joined UROC on August 26, 1952 (amended complaint, par. 7B, R. 23). The same situation obtained with respect to the individual plaintiff Hunt, an engineer, who claimed he was in compliance

with the union shop agreement because he had joined UROC on August 16, 1952 (amended complaint, par. 8C, R. 24). The individual plaintiffs Carlson and Owens are trainmen and they too received notification that they had been cited for non-compliance with the union shop agreement (amended complaint, par. 9A, R. 25). The carrier never received replies to its registered letters from either Carlson or Owens but both of these men subsequently submitted an affidavit to the District Court, sworn to on December 17, 1952, in which they asserted that each had become a member of UROC during August 1952. The Long Island Rail Road Company reached the determination that none of the individual petitioners had met the requirements of the union shop agreements in that they had not become members of any of the "national in scope" railway labor organizations.

The union shop agreement supplementing the original collective bargaining agreement between the New York, New Haven and Hartford Railroad Company and the Brotherhood of Railroad Trainmen was made on July 20, 1951 and became effective September 1, 1951 (New Haven R. 15-18). This agreement is substantially identical with the agreement in the Long Island case (R. 44-49). The 60 day period, in compliance with the provisions of the union shop amendment, within which time an employee could affiliate himself with one of the national in scope Railroad Brotherhoods ended on October 31, 1951.

On or about September 10, 1952, the respondent The New York, New Haven and Hartford Railroad Company notified the individual plaintiffs Harkinson and Beswick that they had been cited by the Brotherhood of Railroad Trainmen for not being in compliance with the Trainmen's

union shop agreement. The carrier afforded Harkinson and Beswick hearings. Harkinson and Beswick duly demanded hearings (complaint, par. 7 B, New Haven R. 9) and such hearings were held on September 25, 1952. At the hearings Harkinson and Beswick asserted that they were in compliance with the union shop agreement in that they were members only of UROC which they claimed was a railway labor organization "national in scope" (complaint, par. 7 B, New Haven R. 9). The New York, New Haven and Hartford Railroad Company reached the determination that neither Harkinson nor Beswick had met the requirements of the union shop agreement in that they had not become members of any of the "national in scope" railway labor organizations.

The amended complaint in the Long Island case (R. 19-49) and the complaint in the New Haven case (New Haven R. 5-18) both seek to have the petitioner UROC declared a railway labor organization "national in scope" within the meaning of Section 2-Eleventh of the Railway Labor Act.

The respondents' motions to dismiss the amended complaint because of the District Court's lack of jurisdiction of the subject matter of the action (R. 50-52) were granted by the District Court (R. 3-5) and the dismissal of the amended complaint was affirmed by the Court of Appeals for the Second Circuit (R. 71).

The motions to dismiss the amended complaint for lack of jurisdiction over the subject matter of the action were made upon the following grounds; that the Congress had deprived the courts of jurisdiction to decide any issues pertaining to employee grievances against carriers or of the interpretation and application of agreements pertain-

ing to wages, rules and working conditions by enacting Section 3, First (i)-(p) of the Railway Labor Act which established an exclusive procedure before the National Railroad Adjustment Board for the very purpose of deciding any of such grievances or disputes (R. 50); that, in any event, the Congress by enacting Section 3, First (f) of the Railway Labor Act had deprived the courts of jurisdiction to determine whether any railway labor organization was "national in scope" by establishing exclusive procedures before the Secretary of Labor and the National Mediation Board to determine this very question (R. 50-51).

The District Court, in granting the respondents' motions to dismiss the amended complaint, held that the National Railroad Adjustment Board had exclusive jurisdiction over the subject matter of the complaint, citing *Order of Railway Conductors* v. *Pitney*, 326 U. S. 255; *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, and *Order of Railway Conductors* v. *Southern Railway Company*, 339 U. S. 255, thus making it unnecessary to pass upon the second ground of the respondents' motions (R. 5-19). The Court of Appeals for the Second Circuit affirmed, *per curiam*, upon the opinion of the District Court (R. 70).

Long after the entry of the order dismissing the amended complaint in the District Court on April 27, 1953 (R. 3-5) and long after the unanimous affirmance of that order by the Court of Appeals for the Second Circuit on June 23, 1953 (R. 68-71) the petitioners, by motion dated October 27, 1953, moved, in the District Court for the Southern District of New York under Rule 60 (b)(6) of the Federal Rules of Civil Procedure, to vacate the judg-

ment and order of the District Court that had been entered upon the mandate of the Court of Appeals for the Second Circuit and for leave to amend the amended complaint by adding thereto a completely new count which would allege that the Railway Labor Act was unconstitutional in various respects. By this most recent motion the petitioners attempted to completely change their original theory. The fact that the petitioners in attempting to add this entirely new count attacking the constitutionality of the Railway Labor Act are completely inconsistent is of little note since that is their privilege but the attempt to do so points up their lack of purpose. For example, the amended complaint alleges "the legally binding provisions of certain collective bargaining agreements * * * between the Defendant [The Long Island Railroad Company] and the [Brotherhoods]" pursuant to Title 45 U. S. C. A., Section 151, *et seq.** (R. 19-20). Further, the amended complaint alleges the petitioners' reliance upon the provisions of the Railway Labor Act and particularly the union shop amendment, asserting "That the Defendant and said The Long Island Rail Road Company are subject to and are governed by the provisions of said Railway Labor Act, as amended, Title 45 U. S. C., Section 151, *et seq.*, and particularly Section 152-Eleventh thereof" ** (amended complaint par. 3C, R. 21). Finally, the amended complaint not only relies completely upon the constitutionality of the union shop amendment but, indeed, totally embraces it, saying that "the sole question involved in this litigation" is whether or not members of UROC are entitled to employment under the provisions of the union shop amend-

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* The Railway Labor Act.

** Section 152-Eleventh is the union shop amendment.

ment "while maintaining their membership solely in said * * * organization * * *" (R. 27).

The petitioners' most recent motion, pursuant to Rule 60 (b)(6), *supra*, to vacate the judgment and order entered upon the mandate of the Court of Appeals and for leave to amend their amended complaint so as to raise the constitutional question for the first time was denied by the District Court in an opinion dated December 8, 1953* upon which an order was duly entered on December 15, 1953. It is well settled that a plaintiff may not assert a new theory of attack which he could certainly have used in the first instance and which was most assuredly within his knowledge but which he did not choose to assert until after the courts had decided against him. See: *Ackermann* v. *United States*, 340 U. S. 193; *Von Wedel* v. *McGrath*, 100 F. Supp. 434; aff'd *per curiam* 194 F. (2d) 1013; see also *Klapprott* v. *United States*, 335 U. S. 601; *United States* v. *Karahalias*, 205 F. 2d 331. In the instant case the petitioners could have sought leave to raise the constitutional issue by an additional count under Rule 15(a) made after the decision of the District Court on April 16, 1953 and prior to the entry of the order of dismissal on April 27, 1953. They could also have sought such leave under Rule 59 during the ten-day period following the entry of the order. The District Court noted that the petitioners did not seek such leave but rather that they waited six months from the time the order was entered dismissing the amended complaint and four months after the affirmance of such dismissal by the Court of Appeals for the Second Circuit.*

Subsequent to the dismissal of its motion to vacate the judgment and to amend the amended complaint in the in-

* Appendix B, pages 29-31.

stant case, UROC moved in one of the other cases which it has brought in other circuits to amend its complaint so as to include the constitutional count. In the case of *Johns* v. *Baltimore and Ohio Railroad Company,* No. 53 C 1927, in the United States District Court for the Northern District of Illinois, Eastern Division, cited at page 23 of the petition, UROC has now so moved. It brought on its motion before the defendant had answered or moved with respect to the complaint and on December 2, 1953, District Judge La Buy signed an order granting leave to UROC to amend its complaint so as to assert the hereinbefore mentioned grounds of the alleged unconstitutionality of the Railway Labor Act. Pursuant to the provisions of Judge La Buy's order, the Chief Judge of the Court of Appeals for the Seventh Circuit, by virtue of 28 U. S. C. A. Section 2284, has designated a three-judge court to hear the question.

In the case of *Lake, et al.* v. *Baltimore and Ohio Railroad Company,* No. 3049, in the United States District Court for the Southern District of Ohio, cited at page 22 of the petition, the District Court held, as it held here, that the National Railroad Adjustment Board had exclusive jurisdiction. UROC did not raise the constitutional question in the *Lake* case. It has since withdrawn its appeal to the Court of Appeals for the Sixth Circuit from the order dismissing its complaint. UROC's complaint was also dismissed upon the same grounds in *Pigott* v. *Detroit, Toledo and Ironton Railroad Co.,* No. 12130, in the District Court for the Eastern District of Michigan on November 10, 1953.

In *United Railroad Operating Crafts, et al.,* v. *Pennsylvania Railroad Company,* No. 52 C 1465, in the United States District Court for the Northern District of Illinois, cited at page 22 of the petition, a Special Master held that

the District Court had jurisdiction to determine whether or not UROC was "national in scope" and he heard testimony on that issue. The Special Master found that UROC was not "national in scope" and the District Court confirmed his report and dismissed the complaint. UROC has appealed to the Court of Appeals for the Seventh Circuit. Understandably, no cross-appeal has been taken on the jurisdictional question but that issue was raised by the pleadings and may, on appeal, be brought up by the appellee or by the Court of Appeals.

In the case of *United Railroad Operating Crafts, et al.* v. *Northern Pacific Railroad Company,* No. 2976, in the United States District Court for the Western District of Washington, cited at page 22 of the petition, the District Court held that the National Railroad Adjustment Board had exclusive jurisdiction of the subject matter—as was held here—but it attempted to maintain the injunction in effect for a 30-day period during which it directed UROC to present its grievances to the Adjustment Board. On November 6, 1953, the Court of Appeals for the Ninth Circuit upheld the District Court in so far as that court held that exclusive jurisdiction lay with the National Railroad Adjustment Board but reversed the District Court for retaining jurisdiction over the injunction portion of the action. The Court of Appeals for the Ninth Circuit completely dismissed the complaint for all purposes on November 6, 1953 as unofficially reported at 33 LRRM 2146.

It is important to note that when this action was brought by UROC against the Northern Pacific Railroad Company, fully nine months before the present actions were instituted, UROC included in its complaint a separate count attacking the constitutionality of the union shop amendment. The complaint in the *Northern Pacific* case was

filed on January 23, 1952 (the complaints here were filed during the latter part of October, 1952). On January 30, 1952, however, UROC voluntarily withdrew its count attacking the constitutionality of the union shop amendment. It is abundantly clear, therefore, that UROC gave serious consideration to the constitutionality of the union shop amendment fully nine months before the present actions were commenced and that it, for reasons best known to itself, decided not to assert that the amendment was unconstitutional but, indeed, it took a voluntary affirmative step to keep the matter from the court's consideration by withdrawing the count. On November 6, 1953, the Court of Appeals for the Ninth Circuit, as hereinabove noted, directed the dismissal of UROC'S complaint, saying:

> "We conclude that the United States District Courts have not been granted jurisdiction to determine issues of the kind tendered by the complaint filed below. Consequently, the cause is remanded to the District Court with directions to dismiss the cause for lack of jurisdiction." (*UROC* v. *Northern Pacific Railroad Company, supra.*)

Thus it is a fact that in every case brought by UROC all over the country the District Courts have uniformly held* —where decisions have been handed down—that the courts lack jurisdiction of the subject matter of the action and that exclusive jurisdiction lies in the National Railroad Adjustment Board. In every case where a Court of Appeals has reviewed the District Court's decision a direction to dismiss the complaint for lack of jurisdiction has been ordered.

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* Except in the *Pennsylvania* case, *supra*, where a Special Master took testimony and decided as a matter of fact that UROC was not "national in scope" and the District Court dismissed the complaint on the merits.

Reasons for Denying the Writ

1. The question of the constitutionality of the exclusive remedies provided by the Railway Labor Act—although raised by the petitioners here—is not properly before this Court. As hereinbefore noted, the petitioners did not question the constitutionality of the Act below nor did they dispute the proposition that the National Railroad Adjustment Board had exclusive jurisdiction under the holdings of this Court in *Order of Railway Conductors of America* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322, 90 L. Ed. 318; *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795; and *Order of Railway Conductors of America* v. *Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811. Indeed, they impliedly conceded the premise but argued that a union shop agreement does not involve the interpretation of agreements concerning "working conditions" so as to bring it under the jurisdiction of the Adjustment Board within the meaning of the *Pitney* line of cases. The District Court rejected UROC's theory, citing *Missouri Pacific R. Co.* v. *Norwood*, 42 F. 2d 765, 773 (W. D. Ark. 1930), cert. denied 283 U. S. 249, and *In re Chicago North Shore & M. R. Co.*, 147 F. 2d 723, 727 (C. A. 7, 1945), cert. denied 325 U. S. 852, in which the phrase "working conditions" as used in the Railway Labor Act was defined as any "such conditions affecting the work of the employees as might be the subject of agreement between the carriers and the employees" (R. 12).

The District Court, in dismissing the amended complaint, held that the disputes alleged therein arose out of "the interpretation or application of [union shop] agreements concerning 'working conditions' as used in Section

3-First (i) of the Railway Labor Act" (R. 14), and that since this Section of the Act confers jurisdiction on the appropriate Division of the National Railroad Adjustment Board to hear and determine all disputes of this character, the jurisdiction of the Board is "exclusive" under the holdings of this Court in the *Pitney, Slocum* and *Southern* cases, *supra* (R. 18).

It is respectfully submitted that these issues, decided by the District Court and affirmed by the Court of Appeals, are the only questions properly before this Court on the present petition for a writ of certiorari.

2. The petitioners' claim at pages 24-26 of the petition that the District Court's decision is in conflict with *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192, is completely fallacious. In the *Steele* case the collective bargaining agreement was palpably illegal because it discriminated against Negro firemen employed by the railroad company solely because of their race. Of course the courts have jurisdiction in such a case. There can be no comparison between the illegal contract in the *Steele* case, *supra,* and the perfectly legal agreements in the case at bar. As the District Court took great pains to point out in its opinion "there is not one line in the amended complaint suggesting that the collective bargaining agreements here are invalid" (R. 15). The *Pitney, Slocum* and *Southern* cases, *supra,* clearly distinguish the difference between legally binding agreements and those that are plainly illegal. This Court clearly stated that legal agreements concerned with the Railway Labor Act should be interpreted by the appropriate tribunals established by the Congress for that purpose but that the courts would be ever alert to assume jurisdiction and grant redress where an agreement was patently illegal and discriminatory.

The District Court summarized the main allegations of the amended complaint, saying that "The amended complaint further alleges that prior to June 20, 1952 [The Long Island Rail Road Company] entered into separate agreements with the Brotherhoods, railway labor organizations, relating to and controlling hours, wages and working conditions * * *; and that such agreements were, on June 20, 1952, supplemented by separate union shop agreements pursuant to the authority of Section 2-Eleventh of the Railway Labor Act; and that the various agreements constitute the respective collective bargaining agreements" between The Long Island Rail Road Company and its employees (R. 6). Later, in discussing these allegations in the amended complaint, the District Court concluded that the allegations contained therein presented a controversy arising out of the interpretation or application of agreements concerning "working conditions" (R. 14) that came within the exclusive jurisdiction of the National Railroad Adjustment Board.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari herein should be denied.

Dated December 28, 1953.

Respectfully submitted,

BERNARD L. ALDERMAN,
Counsel for Respondent
Brotherhood of Railroad Trainmen,
50 Broadway,
New York 4, N. Y.

APPENDIX A

Railway Labor Act of 1934, as Amended 48 Stat. 1186 (1934), 45 U.S.C. §152 (1946), as amended 64 Stat. 1238 (1951) 45 U.S.C. §152 (1952 Supp.); 48 Stat. 1187 (1934), 45 U.S.C. §153 (1946)

§152. General Duties.

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

• • •

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden.

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of

the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden.

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements.

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

* * *

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the ef-

fective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered

in the First division of subsection (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§153. National Railroad Adjustment Board.
First. Establishment; composition; powers and duties; divisions; hearings and awards.

There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers desgnated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor

organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheetmetal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house

employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the contro-

versy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suits the findings and order of the division of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid

out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

• • •

APPENDIX B

Memorandum Opinion of Conger, J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 79-223

UNITED RAILROAD OPERATING CRAFTS, ET AL.,
Plaintiffs-Appellants,

against

THE NEW YORK NEW HAVEN AND HARTFORD RAILROAD COMPANY,
Defendant-Appellee,

BROTHERHOOD OF RAILROAD TRAINMEN,
Intervenor-Appellee,

and

Civ. 79-308

UNITED RAILROAD OPERATING CRAFTS, ET AL.,
Plaintiffs-Appellants,

against

WILLIAM WYER, ET AL.,
Defendants-Appellees,

BROTHERHOOD OF RAILROAD TRAINMEN,
Intervenor-Appellee.

CONGER, J.:

MEMORANDUM

Applications by the plaintiffs under Rule 60(b)(6), F.R.C.P., to vacate and set aside the orders and final judg-

ment of August 31, 1953 entered on the mandate of the Court of Appeals for the Second Circuit, and modifying the order of April 27, 1953 dismissing the amended complaints so as to permit plaintiffs to file an amendment to their amended complaints.

Rule 60(b)(6) authorizes relief from a judgment for "any other reason justifying relief from the operation of the judgment." Plaintiffs place no reliance upon subdivisions (1) to (5) of Rule 60(b).

Plaintiffs' reason for relief under Rule 60(b)(6) amounts to this: that the conclusions expressed in the opinion of the court dated April 16, 1953 (115 F. Supp. 359), as effectuated by the order of April 27, 1953 and judgment of August 31, 1953 entered on the mandate of the Court of Appeals, raise serious questions of the constitutionality of the union shop amendments to the Railway Labor Act, so that plaintiffs in view of the irreparable harm ensuing, should now be permitted to challenge these amendments in these suits. Aside from the fact that the plaintiffs have waited six months from the entry of the order dismissing the suits and four months after the affirmance by the Court of Appeals and also aside from the fact that UROC has opportunity to raise the problem in other cases pending (I am not certain, however, how this would benefit the individual plaintiffs here), the relief sought is denied because the plaintiffs could have, and should have, posed the question long prior to the order of April 27, 1953.

My opinion of April 16, 1953 with the subsequent and consequent orders entered thereon did not bring into being the constitutional issue urged here. Such issue was present and alive when plaintiffs filed their original complaints. Further the authorities cited by the defendants in their attack on the amended complaint, and adopted by the court suggested the strong possibility that the court's decision might be in accord with these authorities. The plaintiffs

may not have anticipated such result but they chose their theory of attack and now they may not adopt a new one, which certainly was within their knowledge but which they chose not to assert.

The applications are denied. *Ackerman* v. *United States,* 340 U. S. 193; *Von Wedel* v. *McGrath,* 100 F. Supp. 434; aff'd *per curiam* 194 F. (2d) 1013; See also *Klapprott* v. *United States,* 335 U. S. 601; *United States* v. *Karahalias,* 205 F. (2d) 331.

Settle Orders.

/s/ Edward A. Conger
United States District Judge

Dated: December 8, 1953

JAN 27 1954

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 472

UNITED RAILROAD OPERATING CRAFTS, A RAILROAD LABOR ORGANIZATION NATIONAL IN SCOPE, AND JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON AND ROBERT T. OWENS, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF THE PLAINTIFF RAILWAY ORGANIZATION AS A CLASS WHO ARE TOO NUMEROUS TO BE MADE PARTIES PLAINTIFFS,

Petitioners,

against

WILLIAM WYER, AS TRUSTEE OF THE LONG ISLAND RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AND BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, A RAILROAD LABOR ORGANIZATION NATIONAL IN SCOPE, AND ROBERT M. HARKINSON AND ARTHUR T. BESWICK, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF THE PLAINTIFF RAILWAY LABOR ORGANIZATION AS A CLASS WHO ARE TOO NUMEROUS TO BE MADE PARTIES PLAINTIFFS,

Petitioners,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

EDWARD J. FRUCHTMAN,
RICHARD F. WATT,
Counsel for Petitioners.

COTTON, FRUCHTMAN & WATT,
1943 Board of Trade Building,
Chicago 4, Illinois,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 472.

UNITED RAILROAD OPERATING CRAFTS, A RAILROAD LABOR ORGANIZATION NATIONAL IN SCOPE, AND JOHN J. GALLAGHER, JR., HOWARD T. HUNT, CLIFFORD W. CARLSON AND ROBERT T. OWENS, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF THE PLAINTIFF RAILWAY ORGANIZATION AS A CLASS WHO ARE TOO NUMEROUS TO BE MADE PARTIES PLAINTIFFS,

Petitioners,

against

WILLIAM WYER, AS TRUSTEE OF THE LONG ISLAND RAILROAD COMPANY, A CORPORATION, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AND BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

UNITED RAILROAD OPERATING CRAFTS, A RAILROAD LABOR ORGANIZATION NATIONAL IN SCOPE, AND ROBERT M. HARKINSON AND ARTHUR T. BESWICK, INDIVIDUALLY AND ON BEHALF OF ALL MEMBERS OF THE PLAINTIFF RAILWAY LABOR ORGANIZATION AS A CLASS WHO ARE TOO NUMEROUS TO BE MADE PARTIES PLAINTIFFS,

Petitioners,

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY AND BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The briefs in opposition of the Brotherhood of Locomotive Engineers (BLE), Brotherhood of Locomotive Engine-

men and Firemen (BLF&E) and the Brotherhood of Railroad Trainmen (BRT) have so phrased their "Questions Presented" as to convey the impression that the issue before the Court is whether or not the National Railroad Adjustment Board has exclusive jurisdiction to settle disputes arising out of contracts. Thus the BRT poses the problem as whether the Adjustment Board has exclusive jurisdiction "to settle disputes between a carrier and its employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions * * *" (BRT Brief, p. 3). The brief of the BLE and BLF&E similarly suggests that there is nothing more than a contract dispute involved (BLE, BLF&E Brief, p. 2).

This presentation of the issue begs the very question before the Court and assumes a conclusion which the petitioners do not dispute, namely, that the Adjustment Board does have jurisdiction over disputes involving the interpretation or application of a contract concerning working conditions.

The issue before the Court, however, is entirely different. Section 2 Eleventh authorizes union shop agreements which give operating railroad employees the option of complying with such agreements by joining either the contracting union or another union which is "national in scope." The quoted phrase is the language of Section 2 Eleventh and is incorporated verbatim in the union shop agreements to which respondents are parties. The individual petitioners claimed compliance with the union shop agreements by virtue of their membership in United Railroad Operating Crafts (UROC). Whether that membership constitutes compliance turns solely on the question whether UROC is "national in scope" as that phrase, taken verbatim from Section 2 Eleventh, is employed in the union shop agreements.

In short, then, the question before this Court is whether the meaning of the statutory language is for the courts to determine or whether respondents, by incorporating the statutory language into their contracts, have transformed a dispute as to the interpretation and application of the statute—a category of dispute which Section 3 First (i) plainly does not give the Adjustment Board power to resolve—into a dispute over "the interpretation or application of agreements concerning rates of pay, rules or working conditions * * *" (45 U. S. C. Section 3 First (i))—a category of dispute which is for the Board to determine.

Thus respondents, by posing the "Question Presented" as involving no more than the Board's power to "settle disputes between a carrier and its employees arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules of working conditions * * *" (BRT Brief, p. 3), have begged the very question before this Court.

II.

Petitioners desire also to correct certain of the respondents' misconceptions with respect to the constitutional questions adverted to in the petitioners' brief. The BRT, the BLE and the BLF&E assert, in substance, that petitioners deliberately refrained from raising constitutional questions before the District Court and that they are therefore precluded from doing so now (BRT Brief, pp. 11-13; BLE, BLF&E Brief, pp. 7-10). This statement of what petitioners are allegedly seeking to accomplish, however, is inaccurate. As pointed out in the Petition, it is "the decision of the District Court" which "raises [the] serious constitutional problems" (Pet. p. 17) listed as Questions Nos. 7-10. Where the District Court's interpretation and application of the Railway Labor Act itself create constitutional issues, that fact alone is sufficient basis for this

Court's examination of those issues, even though, prior to decision by the District Court, petitioners had not attacked the constitutionality of the Act. Litigants who initially raise no constitutional questions cannot be precluded from calling such questions to this Court's attention when those questions are engendered by the lower court's ruling.

III.

In addition to this cause (No. 472), there is presently before this Court *United Railroad Operating Crafts, et al.* v. *Northern Pacific Railroad Company,* pending as Petition for Certiorari, No. 513. Because of the similarity of issues in these two cases, the Clerk of this Court has withheld distribution of briefs in No. 472 until all briefs in No. 513 have been received.

In this connection, the Court's attention is invited to two other cases involving substantially similar jurisdictional issues: *United Railroad Operating Crafts, et al.* v. *Pennsylvania Railroad Company, et al.* (C. A. 7, No. 10914); and *Piggott, et al.* v. *Detroit, Toledo & Ironton Railroad Company* (C. A. 6, No. 12143). In the *Pennsylvania Railroad* case, a Petition for Certiorari was filed in this court on January 25, 1954, before judgment in the Court of Appeals, and is pending as No. 548. Similarly, in the *Piggott* case, a Petition for Certiorari will be filed in this Court at the earliest possible moment, also before judgment in the Court of Appeals.

Respectfully submitted,

EDWARD J. FRUCHTMAN,
RICHARD F. WATT,
Counsel for Petitioners.

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1943 Board of Trade Building,
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Of Counsel.

Office - Supreme Court, U. S.
FILED
MAR 5 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, JOHN J. GALLAGHER, HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, Petitioners,

v.

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN.

UNITED RAILROAD OPERATING CRAFTS, ROBERT M. HARKINSON and ARTHUR T. BESWICK, Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1953

No. 472

UNITED RAILROAD OPERATING CRAFTS, JOHN J. GALLAGHER, HOWARD T. HUNT, CLIFFORD W. CARLSON and ROBERT T. OWENS, Petitioners,

v.

WILLIAM WYER, as Trustee of THE LONG ISLAND RAIL ROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, and BROTHERHOOD OF RAILROAD TRAINMEN.

UNITED RAILROAD OPERATING CRAFTS, ROBERT M. HARKINSON and ARTHUR T. BESWICK, Petitioners,

v.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY and BROTHERHOOD OF RAILROAD TRAINMEN.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN IN OPPOSITION

Subsequent to the filing herein of our brief in opposition on December 30, 1953, the three-judge court convened in *Johns* v. *Baltimore and Ohio Railroad Company,* No. 53 C 1927, N. D. Ill. E. D. (referred to in that brief on p. 9), to consider a claim of a member of UROC that the whole Union Shop Amendment to the Railway Labor Act is un-

constitutional, held, in an opinion handed down on January 20, 1954 (reported 33 LRRM 2413), that no substantial constitutional question was presented and, accordingly, entered an order dissolving itself as improvidently constituted. A direct appeal to this Court therefrom has been noticed in the district court.

Also subsequently, petitions for writs of certiorari have been filed in three of the other cases cited in our brief in opposition (pp. 16-17) as involving members of UROC who have been discharged or threatened with discharge pursuant to a union shop contract. *UROC* v. *Northern Pacific R. R. Co.*, 208 F. 2d 135 (C. A. 9), petition for a writ of certiorari pending, No. 513, this Term; *UROC* v. *Pennsylvania Railroad Co.*, petition for writ of certiorari to the Court of Appeals for the Seventh Circuit pending before decision there, No. 548, this Term; *Pigott* v. *Detroit, Toledo & Ironton Railroad Co.*, 116 F. Supp. 949 (E. D. Mich.), petition for a writ of certiorari to the Court of Appeals for the Sixth Circuit pending before decision there, No. 607, this Term. The petitions in these cases have stated that the issues therein presented are substantially the same as those presented in the instant case, and at least two of the petitions have urged this Court to grant certiorari in the instant case as well as in each of the other cases (Pet. No. 513, p. 9; Pet., No. 548, pp. 3, 4, 9-12; Pet., No. 607, pp. 2, 6, 15-19).

For these reasons we believe that this Court will find it useful to have before it an analysis of the relationship of the aforementioned cases to the instant case in its consideration of the petition here. We are, therefore, filing this brief to summarize the developments which have taken

place since the filing of our brief in opposition herein, and to point out that they do not provide any support for the grant of certiorari.

1. No constitutional question ripe for decision here is presented in any of these cases.[1]

In none of these cases was any constitutional question passed upon by a court of appeals. Only two of these cases have been before Courts of Appeals, the instant case (No. 472), and the *Northern Pacific* Case (No. 513).

While the petition in the instant case seeks to present four constitutional questions (Nos. 7-10, inclusive, Pet. pp. 4-5), these were neither presented to the district court nor to the court of appeals.[2] The petition in the *Northern*

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1. In the *Pennsylvania* case (No. 548) the petition does not seek to raise any constitutional issue.

2. At page 8 of their brief in opposition in the instant case, the Engineers and the Firemen urged that, under the doctrine of *Duignan* v. *United States*, 274 U. S. 195, 200, petitioners were precluded from urging before this Court the unconstitutionality of the Railway Labor Act because petitioners had failed to raise any such issue in the courts below. Petitioners seek, at pages 3 to 4 of their reply brief, to avoid the rule of the *Duignan* case on the ground that the alleged constitutional questions (Nos. 7-10, Pet., pp. 4-5) were "engendered" in the instant case by the ruling by the district court that Congress had vested in administrative agencies exclusive jurisdiction over the subject matter of the action. The suggested distinction of the *Duignan* case, is, however, without merit. Assuming *arguendo*, that the constitutional questions were "engendered" by Judge Conger's ruling, the fact remains that petitioners had full opportunity to raise those very issues in the court of appeals. *Cf. Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673. Petitioners, therefore, stand upon no better footing than the appellant in *Duignan* v. *United States*, *supra*, where this Court declined to consider appellant's challenge to the constitutionality of forfeiture provisions of the National Prohibition Act because he had failed to present that contention to the Court of Appeals although he had made it in the District Court.

Pacific case does, in the last question urged (No. 6, Pet. p. 7), vaguely state a constitutional question respecting delegation to the National Railroad Adjustment Board of "legislative or judicial power". However, neither the petition nor supporting brief in that case makes any further mention of any constitutional issue. Moreover, as in the instant case, no issue of constitutionality had been presented in either the district court or the court of appeals.

Indeed, only in the *Johns* case was a constitutional issue tendered in a district court, and as stated above, the three-judge court held that no substantial constitutional question was presented. In neither of the other cases which UROC or its members seek to bring here before decision by the court of appeals (Nos. 548 and 607) was any of the constitutional questions here urged before, or passed upon by, the district court.

Thus, in this group of cases, UROC and its members are urging this Court to consider constitutional issues which have nowhere below been elucidated by argument, and moreover, to bring the questions here in two instances without even giving the courts of appeal an opportunity to pass upon them. Consideration below might prove that the constitutional issues are not present; that, if present, they are insubstantial; or that all the courts agree on their resolution. The procedure invoked here, absent any conflict in the decisions and any element of overweening immediate public interest, would be contrary to the principles by which this Court has limited its review of constitutional questions to those cases in which the resolution of the question was timely and unavoidable. *Alma Motor Co.*

v. *Timken C.*, 329 U. S. 129, 142. Those principles are especially applicable here since the constitutional questions urged by UROC in these cases are various and different.

In the *Johns* case the constitutionality of the whole Union Shop Amendment to the Railway Labor Act is attacked because of the alleged vague and indefinite standard provided by the phrase "national in scope." On the other hand, in three of the cases (Nos. 472, 548 and 607) the validity of the Union Shop Amendment is assumed, but by questions presented in the petitions for certiorari, various administrative procedures, which the courts have held should be utilized in its administration, have been attacked as unconstitutional.

In the *Northern Pacific* case (No. 548), the only constitutional question urged in the petition is whether the National Railroad Adjustment Board is not essentially a private body or agency and as such constitutionally incapable of making a statutory construction of the phrase "national in scope" (Pet. No. 548, p. 7, Question No. 7).

In the instant case (No. 472), not only is the foregoing constitutional question urged (Pet., No. 472, pp. 4-5, Questions Nos. 7 and 10) but also two other questions are presented attacking the validity of the procedures specified in Section 3, First (f) of the Railway Labor Act, whereby any labor organization seeking to establish its status as national in scope applies to the Secretary of Labor and a special three-man board convened by the National Mediation Board (Pet. No. 472, pp. 4-5, Questions Nos. 8 and 9).

In the *Pigott* case (No. 607) the petition urges the same question as to constitutional validity of the procedures

provided by Section 3, First (f) of the Railway Labor Act (Pet. No. 607, pp. 3-4, Question No. 4) as are urged in the instant case, and, in addition, three different questions: one relating to the constitutional validity of a holding that employees are prejudiced by the failure of the organization to which they belong, to resort to the procedures provided in Section 3, First (f) (Pet. No. 607, pp. 4-5, Question No. 7); another relating to the constitutional validity of making decisions of a special board of adjustment non-reviewable (Pet. 607, p. 4, Question No. 5); and a third relating to the validity of requiring employees to resort to a special board of adjustment for a determination as to their alleged non-compliance with a union shop agreement (Pet. No. 607, p. 4, Question No. 6).

Quite apart from the foregoing considerations, this Court, for another reason would not, in any of these cases pass upon the constitutionality of the administrative remedies provided in Section 3 of the Railway Labor Act. For in none of these cases have UROC and its members availed themselves of all the administrative procedures established by Congress.

In the instant case (No. 472), the *Northern Pacific* case (No. 513), and the *Johns* case, no resort has been had to the appropriate adjustment board. Moreover, in the instant case (No. 472), two of the individual petitioners assert objections to the validity of their discharge, which are not dependent upon either the interpretation or validity of the Union Shop Amendment and which, if established before the Adjustment Board, would obviate, as to those

members, any of the issues urged in this Court.[3] In *Pigott* (No. 607), while adjustment board procedures had been exhausted, the district court pointed out that resort to the Secretary of Labor and the three-man board provided by Section 3, First (f) had not been resorted to. In the *Johns* case the three-judge district court held no constitutional question was presented primarily because *Johns* had asserted various non-constitutional objections which were for consideration by the Adjustment Board and which might dispose of the case without need to reach any constitutional issue.

Not having availed themselves of the administrative procedures provided by the Railway Labor Act, UROC or its members are in no position to be heard to assert that those procedures are unconstitutional. *Aircraft Diesel Corp.* v. *Hirsch,* 331 U. S. 754. Certainly the *Hirsch* doctrine is *a fortiori* applicable in these cases. For the very right sought to be enforced by UROC and its members is entirely statutory in character. That right (*i.e.,* for railway employees to be free from having to maintain membership in the contracting union) is entirely founded in Paragraphs Fourth and Fifth of Section 2 of the Railway Labor Act. And Congress, which created that right, has, by Paragraph Eleventh of Section 2, qualified it by permitting carriers to require that employees maintain membership either in the contracting union or else in a "railway labor organization national in scope." See *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, 315; *Otten* v.

3. If petitioners Carlson and Owens are correct in their allegations that they were denied the hearing by the Appellee carrier which was required by the applicable union shop contract (No. 472, R. 25-26; see p. 4 of our brief in opposition), the National Railroad Adjustment Board would order them reinstated irrespective of the status of UROC.

Baltimore & O. R. Co., 205 F. 2d 58 (C. A. 2). *Cf. International Brotherhood* v. *NLRB*, 341 U. S. 694, 705.

2. Only two cases even present a non-constitutional question which has been passed upon by the court of appeals, *i.e.*, the instant case (No. 472) and the *Northern Pacific* case (No. 513). In those cases the Courts of Appeals for the Second and Ninth Circuits respectively, have construed the Railway Labor Act as conferring on the National Railroad Adjustment Board, to the exclusion of the courts, jurisdiction to determine whether an employer may be required to retain in his employment or to reinstate an employee whom the employer has determined is not in compliance with a union shop contract. Thus, as to this question of statutory construction, there is unanimity, not conflict among the circuits.

Even in the district courts there is unanimity except for the one district judge in the *Pennsylvania* case (No. 548). Moreover, in that case a system board of adjustment rather than the national board would have heard the case,[4] and, in any event, the case was dismissed on the merits. And, subsequent to the *Pennsylvania* case, two other district judges of the same court and one of the judges of the court of appeals for that circuit, sitting as a three-judge court in the *Johns* case, approved the statutory construction adopted by the Courts of Appeal for the Second and Ninth Circuits.

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4. Such special boards of adjustment are authorized by Section 3, Second of the Railway Labor Act (45 U. S. C. 153, Second) and have a jurisdictional scope limited to the same class of disputes as the National Railroad Adjustment Board. See *Primakow* v. *Ry. Express Agency*, 56 F. Supp. 413, 415 (E. D. Wis.); *Atlantic Coast Line R. Co.* v. *Pope*, 119 F. 2d 39, 43 (C. A. 4).

In the *Pigott* case (No. 607), the employees had already been to that special board and the jurisdictional issue before the district court was thus posed in the terms of the reviewability of decisions of special boards of adjustment. Consistently with the decisions in the instant case and the *Northern Pacific* case, the district court held that it was without jurisdiction because of the necessity to exhaust the procedures of Section 3, First (f) of the Railway Labor Act.

We believe that the reasons for denying the writ in the instant case set forth in our brief in opposition (pp. 8-18) are still fully applicable to the instant case, and are also applicable to all the other cases now pending here on petition by UROC or its members.

WHEREFORE, we urge that this Court do not grant certiorari in the instant case or Nos. 513, 548 or 607.

March 4, 1954.

Respectfully submitted,

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